Journal of Air Law and Commerce

Volume 59 | Issue 1 Article 2

1993

Recent Developments in Aviation Case Law

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INTRODUCTION

THE CASES surveyed in the following pages were decided and the opinions published prior to January 1, 1993. Accordingly, the reader should pay careful attention to the possibility that some cases may have had subsequent action taken by the courts modifying or otherwise disposing of the legal issues discussed. Additionally, while the cases have been listed under various subject matter headings, many deal with multiple legal issues which might be covered in a different section of the paper. Finally, it is probable that noteworthy decisions were not reported herein and we regret this oversight.

I. FOREIGN SOVEREIGN IMMUNITIES ACT

A. RELATIONSHIP OF SUBSIDIARY

Gould v. Societe Nationale Industrielle Aerospatiale[1] involved a wrongful death claim under a product liability theory against the owner/operator, distributor and manufacturer of a helicopter which crashed. The pertinent legal issue

[1] 23 Av. L. Rep. (CCH) ¶ 18,349 (E.D. Wash. May 11, 1992).

was whether a Delaware corporation, which was a wholly-owned subsidiary of a foreign corporation, which in turn was wholly-owned by a foreign sovereign (France), qualified for protection pursuant to the Foreign Sovereign Immunities Act (FSIA).[2] The court focused its analysis on whether the Delaware corporation was "an agency or instrumentality of a foreign state."[3] In effect, the court found a conflict between the provisions of the FSIA and the fact that the defendant distributor was a citizen of the State of Delaware for purposes of establishing diversity jurisdiction.[4] The court dismissed defendants' arguments regarding the similarity of interest between the two corporations, along with the contention that the non-jury provision of the FSIA should apply to all parties in the case.[5] The court concluded that the claims against the owner/operator and distributor would proceed with a jury and the claim against the French manufacturer would be tried by the court alone in a parallel trial.[6]

B. Nature of Activity

In *Argentina v. Weltover, Inc.*[7] the United States Supreme Court reviewed the meaning of "commercial activity" and "direct effect" under the FSIA to determine whether the district court had jurisdiction over Argentina in regard to the issuance and trading of certain foreign bonds.[8] The court found that if the activity which was the subject of this suit related to actions on the part of the foreign state which were identical or similar to activities which could be engaged in by a private citizen or corporation, the commercial activity would be sufficient to allow jurisdiction under the FSIA.[9] According to the Court, the FSIA fo-

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[2] 28 U.S.C. §§ 1602-11 (1988).
[3] 28 U.S.C. § 1603(b) (1988).
[4] 28 U.S.C. § 1332(c) (1988).
[5] *Gould*, 23 Av. L. Rep. (CCH) ¶ 18,349, 18,352 (E.D. Wash. May 11, 1992).
[6] *Id.* ¶ 18,353.
[7] 112 S. Ct. 2160 (1992).
[8] *See* 28 U.S.C. § 1605(a)(2) (1988).
[9] *Argentina*, 112 S. Ct. at 2166.

cused on the nature, rather than the purpose or motive of the activity.[10] The Court then reviewed whether the manner in which Argentina regulated the maturity dates on the instruments constituted a commercial activity with a "direct effect" in the United States, and found that because of the payment schedule it did.[11] Although the relevance of the case in an aviation setting may be limited, the opinion provides a good review of the history of the FSIA and a current interpretation and adjudication of a foreign sovereign's attempts at total preclusion of jurisdiction.

Walter Fuller Aircraft Sales, Inc. v. The Philippines[12] involved the purchase of an aircraft from the Republic of the Philippines by a Texas corporation. Following the election of Corazon Aquino to the Presidency of the Philippines, the Philipine government created an agency denominated as the Presidential Commission on Good Government, which among other functions, had the responsibility of seizing purported assets of the Marcos regime and selling them to recover funds for the government. One of the assets seized was a Falcon 50 aircraft that the Commission recovered from a Hong Kong corporation, Faysound Ltd. The Philippine government subsequently sold the aircraft to the plaintiff, Walter Fuller Aircraft Sales, Inc. Distressed about the loss of its property, Faysound successfully litigated the title and ownership of the aircraft against Walter Fuller in federal district court in Arkansas.

The instant lawsuit arose out of Walter Fuller's loss of the aircraft and its claims in the United States District Court for the Northern District of Texas to recover this loss. The claim focused on the contract between the Commission and Fuller. In the contract, the government of the Philippines agreed to defend and hold harmless Fuller from all claims relating to its purchase of the aircraft. The defendants attacked jurisdiction on several

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[10] *Id.*; *see* 28 U.S.C. § 1603(d)(1988).
[11] *Argentina*, 112 S. Ct. at 2168-69.
[12] 965 F.2d 1375 (5th Cir. 1992).

grounds, but most specifically with the argument that the exceptions to the FSIA did not apply to this sale and thus there was no jurisdiction over either the government or the Commission. As a fall-back position, the defendant submitted that the doctrine of *forum non conviens* should apply and the matter should be transferred to the Philippine Court for adjudication. The district court judge[13] concluded that there was jurisdiction over both the government and the Commission.[14] The defendant then appealed this decision to the Court of Appeals for the Fifth Circuit.

The court of appeals concluded that there was in fact jurisdiction over the Commission under the commercial activity exception of the FSIA, but the record contained insufficient evidence to support jurisdiction over the government.[15] The court remanded the case to the district court to determine whether the government could be held liable under an agency theory.[16] The other arguments, including *forum non conviens*, were overruled.[17]

Arriba Ltd. v. Petroleos Mexicanos[18] presents a fascinating factual scenario involving a claim in excess of $1,000,000,000. The Fifth Circuit Court of Appeals provided a lengthy opinion on burden of proof and the appropriate discovery to be undertaken when analyzing whether a defendant should receive immunity under the FSIA based on a commercial transaction. Reviewing the commercial activities exception to immunity, the court concluded that the plaintiff had the burden of proof to show not only that certain commercial activity on the part of the sovereign took place in, the United States and had a direct effect on, parties within the United States, but also that the precise activity that comprised the basis of the

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[13] The Honorable Jerry Buchmeyer, a frequent participant at the Annual SMU Air Law Symposium.

[14] *Walter Fuller*, 965 F.2d at 1375.

[15] *Id.* at 1380-89.

[16] *Id.* at 1380-83.

[17] *Id.* at 1389-90.

[18] 962 F.2d 528 (5th Cir.), *cert. denied*, 113 S. Ct. 413 (1992).

cause of action provided a jurisdictional nexus with the United States.[19] Isolated or unrelated activities are not sufficient.[20] The court concluded that when there were genuine factual disputes as to the status of the foreign government, discovery might be allowed; however, this should be ordered circumspectively.[21] While generalized discovery should not be allowed, discovery carefully focused and limited to verifying the allegations necessary to carry the burden of proof is appropriate. Ultimately, the court concluded that the plaintiff had not alleged sufficient commercial activities on behalf of the foreign state to establish jurisdiction.[22] Thus, jurisdiction over the defendant was not appropriate under the FSIA.

In *Casalino v. Ente Ferrovie Dello Stato*[23] the plaintiff sustained injuries while riding a train in Italy. She fell and was injured when the train changed tracks. The defendant, which operated the train, contended that it was a public entity created and operated by the Italian Government, and thus, claimed immunity pursuant to the FSIA. Plaintiff submitted that while it may have been an entity of a foreign state, the commercial activity exception[24] should apply, rendering jurisdiction proper. Discovery established that while the plaintiff could have purchased her ticket from an agent of the defendant in the United States, she actually purchased her ticket in Italy and she sustained injuries in that country. The court therefore concluded that immunity extended to the defendant and granted the motion to dismiss.[25]

Fargo Weite Reisen v. Jamaica Vacations Ltd.[26] involved a German corporation that sued a wholly-owned subsidiary

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[19] *Id.* at 533-34 (citing Stena Rederi AB v. Comision de Contratos, 923 F.2d 380, 390 n.14 (5th Cir. 1991)).

[20] *Id.*

[21] *Id.* at 534.

[22] *Id.* at 537. *See generally* 28 U.S.C. § 1605(a)(2) (1988).

[23] 779 F. Supp. 338 (S.D.N.Y. 1991).

[24] *See* 28 U.S.C. § 1605(a)(2) (1988).

[25] *Casalino*, 779 F. Supp. at 342.

[26] 790 F. Supp. 272 (S.D. Fla. 1992).

of the Government of Jamaica in federal court in Florida under a breach of contract theory. The parties negotiated and signed the contract in Germany. The contract involved the promotion of tours from Germany to Jamaica. The defendant filed a motion to dismiss for *forum non conveniens* which was denied. While the defendant initially failed to raise the immunity defense available under the FSIA, it subsequently plead immunity in response to the plaintiff's complaint. The plaintiff contended that the defendant waived its right to plead the FSIA as an affirmative defense because it failed to raise immunity in its motion to dismiss. The court held, however, that the defendant's failure to initially raise the immunity defense did not constitute waiver because the defendant pleaded immunity in its first "responsive pleading."[27] The court then analyzed whether the matter should be dismissed pursuant to the FSIA and granted the motion based on an insufficient commercial nexus between the parties and the United States.[28] The court also noted that allowing such litigation would require the courts of the United States to sit as international courts of claims.[29]

Gerding v. France[30] provided a slightly different analysis of the jurisdictional issue. The parents of an employee of AT&T filed a lawsuit claiming damages under the Jones Act,[31] Death on the High Seas Act[32] and the general maritime law of unseaworthiness. The defendants were all French. The decedent worked aboard a vessel involved in laying and repairing underwater communication cables. While at sea, the decedent, a diabetic, became ill and died. The theory of liability was that the "Chef de Mission" aboard the French vessel should have obtained medical records on all personnel embarking on the mission. The French defendants filed a motion to dismiss with support-

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[27] *Id.* at 275. *See generally* 28 U.S.C. §§ 1330, 1602-11 (1988).
[28] *Fargo*, 790 F. Supp. at 276.
[29] *Id.*
[30] 943 F.2d 521 (4th Cir. 1991), *cert. denied*, 113 S. Ct. 1812 (1993).
[31] 46 U.S.C. app. § 688 (1988).
[32] 46 U.S.C. app. §§ 761-67 (1988).

ing documents and affidavits claiming that they were "foreign states" within the meaning of the FSIA, were not engaged in commercial activity within the United States, and were therefore entitled to dismissal.

On appeal, the court examined the record and refused to hear delinquent protestations from the plaintiffs about what discovery *might* have shown.[33] Specifically, the court concluded that once the motion to dismiss with supporting documentation was filed, the burden to prove jurisdiction shifted to the plaintiffs and the allegations of the complaint were simply insufficient to carry this burden.[34] The court discussed in some detail the restrictions that the law placed on an appellate court when speculating as to what discovery might have shown. It concluded that failure to undertake discovery would not be considered relevant and the ultimate ruling on the appeal would come exclusively from the facts developed in the lower court.[35] The appellate court affirmed the dismissal.[36]

II. WARSAW CONVENTION[37]

A. INJURIES/ACCIDENTS WITHIN THE SCOPE

Walker v. Eastern Airlines, Inc.[38] involved a motion by Eastern requesting the trial court to reconsider its earlier opinion denying Eastern's motion for summary judgment. In the alternative, Eastern requested that the court certify the matter for an interlocutory appeal.[39] The thrust of the opinion related to whether a plaintiff injured on an international flight, is precluded from making any claim for damages under state law should its claim under the Warsaw Convention not be applicable. In this case, the court found that the decedent had been on an internatinal flight

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[33] *Gerding*, 943 F.2d at 524-25.
[34] *Id.* at 525-26.
[35] *Id.* at 526-27.
[36] *Id.* at 527-28.
[37] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876.
[38] 785 F. Supp. 1168 (S.D.N.Y. 1992).
[39] *See* 28 U.S.C. § 1292(b) (1988).

but that his death did not qualify as "an accident."[40] Accordingly, Article 17 of the Warsaw Convention was inapplicable. Eastern took the position that plaintiff had no remedy since state causes of action should be precluded from these claims. Thus, the question before the court was whether the plaintiff could plead in the alternative a state cause of action.

In an extensive opinion, the court stated that the United States Supreme Court had twice declined to address whether a plaintiff could institute, alternatively, a state law cause of action where the injuries proved not to be covered by the Warsaw Convention.[41] However, the court, relying on *In re Air Disaster at Lockerbie, Scotland, on December 21, 1988*[42] concluded that the plaintiff's claim was not limited to an action under the Warsaw Convention and that plaintiff could "plainly" institute an action against the air carrier under state law causes of action.[43] The court distinguished a number of cases where plaintiffs' claims were dismissed. It illustrated that in those cases, the plaintiffs had sued *exclusively* under the Warsaw Convention and had faild to seek *alternative* relief under a state law cause of action.

Eichler v. Lufthansa German Airlines[44] involved a passenger allegedly injured while boarding an international flight operated by defendant Lufthansa. She filed suit in New York state court, but the defendant subsequently removed it to federal court pursuant to the FSIA. The facts indicated that the plaintiff was boarding a flight in Frankfurt, Germany, bound for JFK when she stumbled over luggage adjacent to the boarding stairs. Plaintiff contended that her "accident" was in the course of boarding the aircraft on an international flight and thus, was cov-

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[40] *Walker*, 785 F. Supp. at 1170.

[41] *See* Abramson v. Japan Airlines Co., 739 F.2d 130 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985).

[42] 928 F.2d 1267 (2d Cir.), *cert. denied*, 112 S. Ct. 331 (1991).

[43] *Walker*, 785 F. Supp. at 1172.

[44] 794 F. Supp. 127 (S.D.N.Y. 1992).

ered by Article 17 of the Warsaw Convention.[45] She claimed entitlement to a ruling of absolute liability on the part of defendant Lufthansa but agreed that her damages could not exceed $75,000.

Whether or not Lufthansa was entitled to apply the principle of comparative negligence, which was applicable through Article 21 of the Warsaw Convention, represented the central legal issue.[46] The defendant contended that the contributory negligence laws of the forum state (New York) applied, but the court relied on federal common law tort principles. Under those principles the court cited general maritime law as discussed by the Court of Appeals for the Second Circuit in a line of cases leading up to and including *In re Air Disaster at Lockerbie, Scotland, on December 21, 1988*[47] and concluded that the principle of comparative negligence would be applicable.[48]

Li v. Quraishi[49] presented a bizarre factual situation where the district court analyzed the meaning of an accident for purposes of one passenger's claim for *indemnity* regarding the initial claim of another passenger. On a United Airlines flight from Tokyo-Narita to JFK, one passenger allegedly urinated on a passenger-mother and her two-year old child. The mother and child made claims against the airline and passenger under the Warsaw Convention and on theories of negligence and intentional misconduct. The defendant passenger filed a claim for indemnification and contribution. United filed a motion for summary judgment which was *not* opposed by the plaintiff. Thus, the issue for decision by the court was whether the

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[45] "The carrier shall be liable for damage sustained . . . if the accident which caused the damage so sustained took place . . . in the course of any of the operations of embarking or disembarking." Warsaw Convention of 1929, art. XVII, 49 Stat. at 3018.

[46] "If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability." Warsaw Convention of 1929, art. XXI, 49 Stat. at 3019.

[47] 928 F.2d 1267 (2d Cir.), *cert. denied*, 112 S. Ct. 331 (1991).

[48] *Eichler*, 794 F. Supp. at 129-30.

[49] 780 F. Supp. 117 (E.D.N.Y. 1992).

defendant-passenger was entitled to indemnity from the air carrier if the plaintiffs were able to prove a case for purely psychological injuries.

United pleaded a defense under Article 17, and the court analyzed the defense in conjunction with Article 25 relating to intentional misconduct.[50] This was a somewhat different analysis than that undertaken by the United States Supreme Court in *Eastern Airlines, Inc. v. Floyd*.[51] In that case the Supreme Court concluded that bodily injuries under Article 17 did *not* include purely mental or psychological injuries.[52] It did not analyze what type of injuries might be included if the air carrier's conduct was intentional. The district court, analyzing *Floyd*, *In re Air Disaster at Lockerbie, Scotland, on December 21, 1988*,[53] and *In re Korean Air Lines Disaster of September 1, 1983*,[54] concluded that Article 17's preclusion of recovery for purely psychological damages was *not* a limitation which was modified by Article 25, even if willful misconduct could be proven.[55] Accordingly, the court granted United's motion for summary judgment and dismissed the urinating passenger's cross-claim for indemnity.[56]

In *Stovall v. Northwest Airlines, Inc.*[57] the plaintiff and her mother were travelling on an international flight from London to Minneapolis with an intermediate stop in Boston. The plane had arrived safely at Boston's Logan Airport and the plaintiffs disembarked to clear customs and proceed to their final destination on a new aircraft. After clearing customs, the defendant transfered the passengers' luggage to the new aircraft and the passengers were given tickets that entitled them to transportation aboard a Massachusetts Port Authority bus to the domestic air ter-

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[50] *Id.* at 119.
[51] 111 S. Ct. 1489 (1991).
[52] *Id.* at 1502.
[53] 928 F.2d 1267 (2d Cir.), *cert. denied*, 112 S. Ct. 331 (1991).
[54] 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 112 S. Ct. 616 (1991).
[55] *Li*, 780 F. Supp. at 119-20.
[56] *Id.* at 120.
[57] 595 N.E.2d 330 (Mass. 1992).

minal. In the course of the transportation, one of the bus doors opened and both plaintiff and her mother fell from the stairway of the bus where they had been standing. Both sustained injuries and the mother died as a result of her injuries.

The case presented the issue of whether Article 17 of the Warsaw Convention made the defendant-airline strictly liable for the injuries sustained pursuant to actions by the independent contractor providing ground transportation. After analyzing the facts pursuant to *Day v. Trans World Airlines, Inc.*,[58] the Massachusetts court found that the defendant-airline did not require the plaintiff and decedent to take that particular bus nor did it control their transportation in any way between aircraft.[59] Thus, the Massachusetts Port Authority rather than defendant-airline exercised control over the two passengers.[60] The court concluded therefore that although this truly was an "accident" within the meaning of Article 17, it occurred outside the terminal building while the passengers were on a public bus, thus the risk which ultimately materialized and caused the harm was not a risk of aviation.[61]

In re Air Crash Disaster Near Honolulu, Hawaii, on February 24, 1989[62] provided yet another decision arising out of the midair accident of United Flight 811, en route from Honolulu to Australia. The court reviewed the interaction of the Death on the High Seas Act[63] (DOHSA) and the Warsaw Convention. The court previously had concluded that a cause of action under DOHSA was a necessary claim to be asserted by the plaintiffs under these facts and DOHSA specifically precluded the availability of non-pecuniary damages under general maritime law or under state law.[64] In this decision, the court resolved whether

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[58] 528 F.2d 31, 33 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976).
[59] *Stovall*, 595 N.E.2d at 333.
[60] *Id.*
[61] *Id.* at 333-34.
[62] 783 F. Supp. 1261 (N.D. Cal. 1992).
[63] 46 U.S.C. app. §§ 761-68 (1988).
[64] *In re Air Crash Disaster Near Honolulu, Hawaii*, 783 F. Supp. at 1267.

the Warsaw Convention provided a basis for awarding the non-pecuniary damages excluded by DOHSA.

In a detailed analysis of the Warsaw Convention and DOHSA, the court ultimately held that although DOHSA did not contain a survival provision, it did *not* specifically preempt alternative statutory survival remedies.[65] The court concluded that the survival component of the Warsaw Convention action encompassed recovery for pre-death pain and suffering. Thus, plaintiffs herein were entitled to recover for such damages through Article 17 of the Warsaw Convention, in spite of the general tenet of DOHSA.[66] The court also concluded that since plaintiffs asserted claims under the Warsaw Convention, they would be entitled to a jury trial, rather than being limited to a trial by judge alone in accordance with admiralty jurisdiction.[67]

The court in *In re Korean Airlines Disaster of September 1, 1983*[68] reviewed the same issue of whether plaintiffs would be entitled to a jury during the damages phase of the case, in light of the fact that there was an apparent conflict between the provisions of DOSHA[69] and the Warsaw Convention.[70] The thrust of the airline's position was that since the DOHSA claim was in admiralty, the plaintiff should be precluded from having a jury trial. The court, however, dismissed this argument on the basis that a jury triable survival claim was joined with the admiralty claim, and thus, the admiralty claim was capable of being tried by a jury as well.[71]

Kleiner v. Qantas Airways, Ltd.[72] enjoyed a long and fruit-

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[65] *Id.* at 1265 (including remedies contained in the Jones Act 46 U.S.C. app. § 688 (1988) and the Federal Employer's Liability Act, 45 U.S.C. §§ 51-59 (1988)).

[66] *In re Air Crash Disaster Near Honolulu, Hawaii*, 783 F. Supp. at 1265.

[67] *Id.* at 1266 (citing FED. R. CIV. P. 9(h)).

[68] 798 F. Supp. 750 (D.D.C. 1992).

[69] 46 U.S.C. app. § 761-768 (1988).

[70] *In re Korean Airlines Disaster of September 1, 1983*, 798 F. Supp. at 751.

[71] *Id.* at 753.

[72] No. 88 Civ. 8642, 1990 WL 80047 (S.D.N.Y. June 4, 1990), *aff'd*, 970 F.2d 895 (2d Cir. 1992).

ful life in spite of a rather simple set of facts. The plaintiff was a passenger on a flight to New Zealand and Australia and allegedly suffered an adverse reaction from an insect spray that was utilized immediately prior to arrival in both countries. In a non-jury trial, the court concluded that the plaintiff's reaction was idiosyncratic and thus, did not constitute an "accident" within in the meaning of Article 17 of the Warsaw Convention.[73] The judgment was appealed to the Court of Appeals for the Second Circuit and remanded for purposes of obtaining additional evidence to determine whether the spraying was required by regulation, how long the particular disinfecting program was in effect, and finally, whether reports of adverse reactions were so minimal as to constitute plaintiff's reaction as idiosyncratic.[74] Upon additional hearing, the trial court granted a motion for summary judgment, concluding that the injuries sustained were not compensable under Article 17 of the Warsaw Convention and there was no other basis on which plaintiff could recover.[75] This was appealed for a second time and the Second Circuit Court of Appeals affirmed.[76]

Gonzalez v. TACA International Airlines[77] is another case questioning what type of injury constitutes an "accident." The federal court in Louisiana was confronted with a complicated sequence of events which allegedly led to an angina attack suffered by a passenger during a flight. The plaintiff contended that a flight attendant's spilling food on him, serving him a beverage that contained a foreign body in it, and requiring him to check six carry-on bags lead to the angina attack which lasted for approximately twenty to thirty minutes during the flight. Upon arrival of the flight, the passenger claimed to have been hospitalized for approximately a month to treat the sequelae of

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[73] *Id.* at *1.

[74] *Id.* at *2.

[75] *Id.*

[76] *Id.*

[77] Civ. A. 91-0175, 1992 WL 142399 (E.D. La. June 18, 1992).

the attack. The district court concluded that spilling food and serving a beverage containing a foreign body constituted an "accident" within the meeting of Article 17.[78] The court also concluded that requiring the plaintiff to check his luggage was not an "accident" even though it may have caused the plaintiff personal inconvenience and emotional discomfort.[79] The court awarded the plaintiff $5,000 for the bodily injury resulting from the spilled food and adulterated beverage.[80]

Price v. British Airways[81] reached the conclusion that injuries sustained by a passenger as a result of a fist fight with another passenger did not constitute an "accident" for purposes of applying the Warsaw Convention.[82] The injuries were not related to the carrier's operation of the aircraft because a fist fight was not a characteristic risk of air travel.[83] The court distinguished this activity from a terrorist action or hijacking for which an air carrier might provide appropriate security.[84]

In *Adler v. Malev Hungarian Airlines*[85] the court held that *Eastern Airlines, Inc. v. Floyd*[86] was conclusive of the alleged injuries raised by the plaintiffs in this case. The court reasoned that since the alleged injuries occurred during international air travel, and were the result of an "accident" which took place on the aircraft, the claim fell strictly within the scope of the Warsaw Convention.[87] Because the plaintiffs sustained only mental injuries, however, which by case law had been strictly precluded from recovery, the court held it would be impermissible to allow a collateral claim to be made pursuant to state law.[88] Ac-

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[78] *Id.* at *2.
[79] *Id.*
[80] *Id.* at *3.
[81] 23 Av. L. Rep. (CCH) ¶ 18,465 (S.D.N.Y. Jul. 7, 1992).
[82] *Id.* ¶ 18,466.
[83] *Id.* ¶ 18,467.
[84] *Id.*
[85] No. 89 Civ. 8252, 1992 WL 15144, at *2 (S.D.N.Y. Jan. 23, 1992).
[86] 499 U.S. 530 (1991).
[87] *Adler*, 1992 WL 15144, at *3.
[88] *Id.* at *4.

cordingly, a motion for summary judgment in favor of the defendant airline was granted.[89]

In *Chendrimada v. Air-India*[90] the plaintiffs sued under the Warsaw Convention for injuries sustained as a result of alleged confinement to the defendant's aircraft for eleven and a half hours resulting from heavy fog at the departing airport. The complaint failed to provide details of the physical injury but the plaintiff contended that he suffered from weakness, nausea, cramps, pain, anguish, malnutrition, and mental injury. The court concluded that if believed, these injuries were sufficient to constitute an "injury," and the delay and alleged refusal to allow the plaintiffs to leave the aircraft could constitute an "accident," as it was unexpected and external to the passengers.[91] However, factual conflicts arose as to whether or not the plaintiffs were actually forced to stay on board the aircraft, so the court indicated that additional evidence should be produced on these points in order to determine whether an injury causing accident actually occurred.[92]

B. JURISDICTION

Pflug v. Egyptair Corp.[93] involved a claim for injuries to a passenger sustained during a 1985 hijacking. While the court gratuitously reviewed various issues that could have been decided under the Warsaw Convention (injuries during hijacking were caused by an "accident"),[94] the thrust of the case related to whether a subsidiary of a foreign airline constituted a "carrier" under Article 28. The court concluded that Egypt Air Corporation was a mere paper entity and the actual carrier involved in the international transportation was Egypt Air, the state-owned air-

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[89] *Id.*

[90] 802 F. Supp. 1089 (S.D.N.Y. 1992).

[91] *Id.*

[92] *Id.* at 1092-93.

[93] 961 F.2d 26 (2d Cir. 1992).

[94] Husserl v. Swiss Air Transp. Co., 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973).

line of Egypt, which was domiciled in Egypt.[95] Accordingly, the court concluded that the plaintiffs had sued the wrong defendant and thus, granted a motion to dismiss for lack of subject matter jurisdiction.[96]

Swaminathan v. Swiss Air Transport Co.[97] involved the issue of where a claim governed by Article 28 of the Warsaw Convention might be brought. The plaintiff-passenger purchased a round-trip ticket from the defendant to travel from Senegal to New York via Switzerland. The outbound legs specifically listed travel dates, although, the return portion was "open." Upon arrival in New York, on the second leg of his trip, an object from the overhead compartment allegedly fell out and struck the plaintiff. The plaintiff subsequently filed a suit in Texas state court that was removed to federal court pursuant to the Warsaw Convention. The district court dismissed for lack of subject matter jurisdiction.[98]

On appeal, the plaintiff attempted to distinguish his case from controlling case law. First, the plaintiff argued that since the return portion of the ticket was left "open" and the completed portion of the ticket showed New York as the final destination, jurisdiction should be established in the United States. The court quickly dismissed this argument citing *In re Alleged Food Poisoning Incident, March, 1984*[99] and concluded that a round-trip ticket originates and terminates at the same location.[100] The plaintiff then argued that it was his intention at all times to have New York as his final destination, and the only reason he purchased the round-trip ticket was because it was less expensive than a one way fare. The court distinguished the holding in *In re Air Crash Disaster Near Warsaw, Poland, on May 9, 1987*[101] and focused on the contract between the

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[95] *Pflug*, 961 F.2d at 31-32.
[96] *Id.* at 32.
[97] 962 F.2d 387 (5th Cir. 1992).
[98] *Id.* at 388 (relying on FED. R. CIV. P. 12(b)(1)).
[99] 770 F.2d 3 (2d Cir. 1985).
[100] *Swaminathan*, 962 F.2d at 389.
[101] 760 F. Supp. 30 (E.D.N.Y. 1991).

parties, which in this case was the round-trip ticket.[102] Finding that the ticket was unambiguous as to final destination, the court concluded that New York was merely an interim stop and Senegal was the point of origin and destination.[103] The only ambiguity in the contract was the time of the travel, *not* the destination. The court also dismissed plaintiff's final argument that Swiss Air had an office in New York which should be considered its principal place of business, concluding that Swiss Air was clearly incorporated in Switzerland, which was its principal place of business within the meaning of Article 28.[104]

Independent Air, Inc. v. Tosini[105] concerned the crash of a flight attempting to land in the Azores, Portugal. The defendants were the owner of the aircraft, and the lessor operating the aircraft when it crashed. The trial court entered an order finding the operator of the aircraft negligent, but concluded that the limitations on liability contained in the Warsaw Convention were not applicable.[106] The appellate court reversed, holding that the company which actually operated the flight should be considered a carrier under the intent of the Warsaw Convention; to do otherwise would frustrate the intentions of the participants at the Convention.[107] Accordingly, the court held the defendants were entitled to limit damages under the Warsaw Convention.[108]

Bodner v. United Airlines, Inc.[109] involved a wrongful death action resulting from the crash of United Airlines Flight 585 traveling from Denver to Colorado Springs, Colorado, which killed the plaintiff's decedent. The decedent had made arrangements through American Express to travel from Toronto, Canada, to Colorado Springs,

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[102] *Swaminathan*, 962 F.2d at 389.
[103] *Id.*
[104] *Id.* at 390.
[105] 600 So. 2d 3 (Fla. Dist. Ct. App. 1992).
[106] *Id.* at 4.
[107] *Id.* at 5.
[108] *Id.* at 3.
[109] 23 Av. L. Rep. (CCH) ¶ 18,509 (E.D. Pa. 1992).

Colorado, and return. The initial arrangements included a flight from Toronto to Chicago with a change of planes and a subsequent flight directly to Colorado Springs. The tickets issued to the decedent contained the appropriate conditions listed thereon, including advice that the Warsaw Convention might be applicable. On arrival at Chicago, however, the plane for the next leg incurred a delay leading to the presentation of a revised itinerary. The changes required a stay overnight in Chicago with a flight the next morning from Chicago to Denver and then from Denver to Colorado Springs. The airlines provided the decedent with a re-issued flight coupon containing the original ticket number and the notation that it was "SOLD SUBJECT TO CONDITIONS OF CONTRACT ON PASSENGERS COUPON OF ORIGINAL TICKET." There was no change to the return portion of the trip from Colorado Springs to Toronto.

While admitting that the original ticket and itinerary constituted international travel, the plaintiff argued that due to the change in the itinerary, the decedent was on a domestic rather than an international flight at the time of the accident and thus, the Warsaw Convention was not applicable. The court disagreed, concluding that the decedent remained an international traveler and the substituted ticket incorporated by reference the applicability of the Warsaw Convention.[110] Accordingly, the court concluded that the Warsaw Convention applied, *but did not* preclude the plaintiff from making other contentions consistent with the application of the Warsaw Convention.[111]

Nissan Fire & Marine Insurance Co. v. Singapore Airlines[112] involved the legal issue of whether the newly created country of Singapore should be deemed by law to have adhered to the Warsaw Convention. The court noted that

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[110] *Id.* ¶ 18,512-13.

[111] *Id.* ¶ 18,514.

[112] No. C 91-3858, 1992 U.S. Dist. LEXIS 4589 (N.D. Cal. Mar. 27, 1992).

Singapore was a signatory of the Hague Protocol,[113] which provided at Article XXIII that adherence to the Hague Protocol constituted adherence to the Warsaw Convention.[114] Accordingly, the court concluded that the Warsaw Convention applied to Singapore Airlines, which the court deemed to be wholly owned by the country of Singapore.[115] It was also noted that a similar decision in regard to Singapore Airlines had been reached by another court.[116] Finally, since the international travel originated in Australia and proceeded to Singapore, the court concluded that under Article 28(1) of the Warsaw Convention, jurisdiction was proper in either Australia or Singapore, but not the United States.[117]

C. CARGO/BAGGAGE CLAIMS

In *Eisenkeit v. Nigeria Airways, Ltd.*[118] the plaintiff originally brought an action in New York small claims court for the loss of certain luggage during an international flight on Nigeria Airways. The plaintiff apparently pursued the defendant's claims procedures for a significant period of time without success. The defendant finally advised him to pursue his rights in litigation, which he did in a timely fashion according to New York law, although more than two years passed since the arrival of his flight. The district court granted the defendant's motion to dismiss the complaint pursuant to Article 29, concluding that the Warsaw Convention's two-year time limitation constituted a condition precedent and was not affected by New York law.[119] The court did indicate that the plaintiff might have a claim in fraud, but it was not the subject of the present

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[113] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, September 28, 1955, 478 U.N.T.S. 371.

[114] *Nissan*, 1992 U.S. Dist. LEXIS 4589, at **5-6.

[115] *Id.* at **6-7.

[116] Sulewski v. Federal Express Corp., 749 F. Supp. 506 (S.D.N.Y. 1990), *aff'd*, 933 F.2d 180 (2d Cir. 1991).

[117] *Nissan*, 1992 U.S. Dist. LEXIS 4589, at *4.

[118] No. 91 C 3057 1992 U.S. Dist. LEXIS 2604 (E.D.N.Y. 1992).

[119] *Id.* at *2.

litigation.[120]

Arkwright-Boston Manufacturer's Mutual Insurance Co. v. Intertrans Airfreight Corp.[121] concerned an action brought by underwriters against a warehouse owner seeking to recover damages for goods shipped overseas that arrived in a damaged condition. The warehouse owner joined the air carrier claiming that Articles 11 and 18 of the Warsaw Convention created a presumption that air carriers receive cargo in good order and condition; therefore, any damages subsequently discovered were deemed to have occurred during the period of the air carrier's responsibility for same. The goods in question were crated. It was uncontested that there was no visible damage to the packaged equipment until the crate was removed. The court concluded that the air carrier could not be liable under a presumption since damage to the goods could not have been determined prior to accepting the shipment.[122]

Lufthansa German Airlines v. American Airlines, Inc.[123] involved a loss of cargo that was to be transported from New York to St. Thomas. Plaintiff Lufthansa entered into an agreement with a jeweler in Hong Kong to transport gold jewelry with precious and semi-precious stones from Hong Kong to St. Thomas via New York. Lufthansa subcontracted with American Airlines to transport the cargo from New York to St. Thomas. The American flight intended to transport the cargo direct from New York to St. Thomas, departed before the goods were received. American arranged alternative transportation without the knowledge of Lufthansa. American flew the jewelry to San Juan, Puerto Rico, and subsequently transferred the goods to a second carrier for transportation to St. Thomas. While the initial air waybill indicated the international nature of the carriage and designated the goods

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[120] *Id.*

[121] 777 F. Supp. 103 (D. Mass. 1991).

[122] *Id.* at 107 (citing D.P. Apparel Corp. v. Roadway Express, Inc., 736 F.2d 1 (1st Cir. 1984)).

[123] 797 F. Supp. 446 (D.V.I. 1992).

as "high value", the agreement between American and the subsequent carrier did not. The goods were lost.

Suit was filed and the court was presented with motions for summary judgment. Lufthansa argued that it was entitled to summary judgment because American's actions constituted a material breach of contract, moving the dispute beyond the ambit of the Warsaw Convention. The breach occurred because the air waybill failed to designate any intermediate stops. The court concluded that there were genuine issues of fact that needed to be resolved.[124] The court did hold, however, that in the interest of routine interpretation and enforcement of the Warsaw Convention, the international nature of the agreement and contractual voyage would be enforced under the terms of the Warsaw Convention.[125]

American moved for summary judgment as well on the basis that Lufthansa lacked standing to bring the action because Lufthansa was not the real party in interest. American further argued that the doctrine of champerty barred the claim. Interpreting Articles 12, 13 and 14 of the Warsaw Convention, the court concluded that Articles 14 and 15 would be construed broadly to permit parties other than the named consignee or consignor to bring an action under the Convention.[126] Under the broad construction, the court denied American's summary judgment motion.[127]

Finally, the subsequent carrier, also named as a party, had its motion for summary judgment denied on the basis that material questions of fact existed concerning whether it was a successive carrier under Article 1(3).

Bazzy v. Royal Jordanian Airlines[128] involved the loss and damage of certain shipments of perfume on defendant airline from Aman, Jordan, to JFK. The matter was re-

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[124] *Id.* at 450.

[125] *Id.* at 451 (adopting Rotterdamsche Bank & Another v. B.O.A.C. & Aden Airways, Ltd., 1 Lloyd's Rep. 154 (Q.B. 1953)).

[126] *Id.* at 452.

[127] *Id.*

[128] 23 Av. L. Rep. (CCH) ¶ 18,395 (E.D.N.Y. May 7, 1992).

moved to federal court pursuant to the Foreign Sovereign Immunities Act and defendant moved for dismissal on the basis that the two-year statute of limitations in Article 29(1) of the Warsaw Convention time-barred the claim. The court concluded that Article 29 was a condition precedent that amounted to an absolute time bar, and granted the motion.[129]

In *Atlantic Mutual Insurance Co. v. Northwest Airlines, Inc.*[130] the court concluded that the Warsaw Convention applied to a shipment of goods from the United States to Taipei, Taiwan. The Executive Branch of the United States formerly recognized the People's Republic of China as the legitimate government of China, and since the People's Republic was a signatory of the Warsaw Convention, the court concluded that Taiwan, as a portion of the People's Republic of China, was bound by this action.[131] Accordingly, the court held that the Warsaw Convention applied to damage to goods shipped from the United States to Taiwan.[132]

In *Rageb v. DHL Worldwide Express*[133] the plaintiff contended that he contracted with DHL to ship a package containing dental supplies to Cairo, Egypt. Instead of taking four days as promised, however, it took sixteen days to arrive. Plaintiff sought damages in the amount of $10,000 for monetary losses, which included the value of the package as well as overseas phone calls and incidental expenses. DHL contended that it was not liable for any damages because the airbill contained a disclaimer that "DHL WILL NOT, UNDER ANY CIRCUMSTANCES, BE LIABLE FOR DELAY IN PICK-UP, TRANSPORTATION, OR DELIVERY OF ANY SHIPMENT, REGARDLESS OF THE CAUSE OF SUCH DELAY."[134]

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[129] *Id.* ¶ 18,397.

[130] 796 F. Supp. 1188 (E.D. Wis. 1992).

[131] *Id.* at 1191.

[132] *Id.*

[133] 23 Av. L. Rep. (CCH) ¶ 18,486 (N.D. Ill. Mar. 11, 1992).

[134] *Id.*

Distinguishing *Jahanger v. Purolator Sky Courier*,[135] the court held that DHL failed to provide any explanation for the delay, and thus would not be allowed to implement the terms of the disclaimer.[136] The court concluded that the limitation of liability applied, limiting the damages to the declared weight of six pounds.[137] Accordingly, the court entered judgment in favor of the plaintiff in the amount of $54.42.[138]

D. LIMITATIONS

Onyeanusi v. Pan Am[139] concerned the notification requirements set forth in Article 26(3). The facts of the case indicate that the plaintiff's mother, a Nigerian and member of the Ibo tribe, was visiting her son in Philadelphia when she unexpectedly died. A funeral home arranged to have the remains prepared and transported by Pan Am from New York to Nigeria via France. The remains were to leave New York on October 15 and arrive in Nigeria two days later. On October 17, the estimated date of arrival, approximately 20,000 members of the Ibo tribe gathered in anticipation of the body's arrival and a traditional tribal funeral and burial.

For reasons that set forth in the opinion, the body did not arrive until October 25. During the eight-day delay, the son received conflicting reports from Pan Am and was presented on one occasion with the remains of a "complete stranger."[140] Further, when the remains ultimately arrived on October 25, they were "damaged and decomposed."[141] Apparently, the authorities in France noticed some damage to the container in which the body was being transported. The authorities allowed a French funeral home to prepare the casket and rewrap the body; how-

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[135] 615 F. Supp. 29 (E.D. Pa. 1985).
[136] *Rageb*, 23 Av. L. Rep. ¶ 18,487.
[137] *Id.*
[138] *Id.*
[139] 952 F.2d 788 (3d Cir. 1992).
[140] *Id.* at 790.
[141] *Id.*

ever, when the body arrived in Nigeria, it had been wrapped in burlap, which, according to the Ibo tribe's culture, indicated the person committed suicide. Further, the body had been placed face down in the casket, which, according to tribal culture, indicated a dishonorable death.

The son filed suit against Pan Am, and the court granted the defendant's summary judgment.[142] The basis of the defense was that the plaintiff failed to provide appropriate written notification in the time allowed, which was seven days for damaged goods[143] and fourteen days regarding delivery of goods.[144] Citing *Johnson v. American Airlines, Inc.*,[145] and distinguishing *Tarar v. Pakistan Int'l Airlines*,[146] the appellate court affirmed, concluding that human remains must be classified as goods because they can have a "significant commercial value."[147] The court felt it preferable to broadly interpret the Warsaw Convention rather than exclude human remains from the definition of goods.

Distribuidora Dimsa S.A. v. Linea Aerea Del Cobre S.A.[148] involved the loss of video recorders during air transportation. The plaintiff contented that Article 8 of the Warsaw Convention required certain information to be provided in the waybills, failing which, the air carrier should be precluded from limiting liability under Article 9 of the Warsaw Convention. The two waybills in question set forth the gross weight of the shipments and the number of the pieces, but did not have information relating to the method of packing, the particular marks or numbers on the packages or the volume and dimensions of same. The court concluded that the omitted information was "com-

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[142] *Onyeanusi*, 952 F.2d at 790.

[143] Warsaw Convention of 1929, art. XXVI (2), 49 Stat. at 3020.

[144] *Id.*

[145] 834 F.2d 721 (9th Cir. 1987).

[146] 554 F. Supp. 471 (S.D. Tex. 1982).

[147] *Onyeanusi*, 952 F.2d at 792 (explaining that medical schools purchase cadavers).

[148] 785 F. Supp. 49 (S.D.N.Y.), *aff'd*, 976 F.2d 90 (2d Cir. 1992).

mercially insubstantial or insignificant and non-prejudicial"[149] and, thus, the absence of this information was not material to anyone in the chain of distribution.[150] Accordingly, the court ruled in favor of the air carrier and allowed the limitation on liability.[151]

In *Ospina v. Trans World Airlines, Inc.*[152] the Court of Appeals for the Second Circuit reversed the lower court's decision finding the evidence presented was sufficient to allow the jury to find willful misconduct permitting damages in excess of those set by Article 17. The underlying facts of *Ospina* involved the crash of an aircraft in 1986 when a bomb on board exploded on approach to Athens airport. Evidence indicated that certain normal TWA inspection procedures were not completed when the passengers boarded the flight. The court relied on the fact that while TWA may have failed to undertake certain normal inspection measures, this failure did not violate any specific FAA requirement.[153] Specifically, the court emphasized the fact that no other airline regularly performed the detailed inspection and concluded that "the test for willful misconduct is not 20-20 hindsight."[154]

In *Vargas v. American Airlines, Inc.*[155] several passengers allegedly were injured in the process of an emergency evacuation of an American Airlines aircraft involved in international travel. The court was presented with the issue of whether the two-year statute of limitations under Article 29 of the Warsaw Convention would bar the claim or whether the defendant air carrier should be equitably estopped from asserting this defense. The thrust of the case concerned the improper naming of the corporate defendant. The court concluded that the air carrier had not un-

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[149] *Id.* at 51 (citing Exim Indus., Inc. v. Pan Am. World Airways, Inc., 754 F.2d 106 (2d Cir. 1985)).

[150] *Id.* at 50.

[151] *Id.* at 51.

[152] 975 F.2d 35 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1944 (1993).

[153] *Id.* at 37.

[154] *Id.*

[155] 23 Av. L. Rep. (CCH) ¶ 18,227 (S.D.N.Y. Jan. 14, 1992).

dertaken any deception in regard to its proper identity and thus the court granted the defendant's motion for summary judgment, enforcing the time bar of Article 29.[156]

Trofi v. Qantas Airways, Ltd.[157] involved personal injuries allegedly sustained by the plaintiffs on a trip from Rhode Island to Australia when the Qantas aircraft encountered turbulence. The injuries allegedly were sustained on May 15, 1988 and plaintiffs attempted service upon Qantas by delivering the summons and complaint to the Rhode Island Secretary of State on May 8, 1991. On October 16, 1991, a copy of the papers were mailed to the Qantas office in San Francisco, and on October 18, 1991, the plaintiffs took a default judgment. The defendant moved to vacate the default judgment due to lack of personal jurisdiction pursuant to the Foreign Sovereign Immunities Act.[158] The court concurred, finding that the purported service on the Rhode Island Secretary of State did *not* constitute valid service under the FSIA.[159] Accordingly, the default judgment was vacated. The court went on, however, to review the timeliness of the claim and concluded that it was time-barred and thus, the defendant's motion to dismiss was granted.[160]

III. FEDERAL TORT CLAIMS ACT

A. JURISDICTION

The plaintiff in *Wood v. United States*[161] was involved in bidding on a Piper Embraer aircraft that the United States Customs Service had seized. Prior to the beginning of the auction, the plaintiff discussed the condition of the aircraft with the auctioneer who warranted that the aircraft would be issued an FAA airworthiness certificate. Based

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[156] *Id.* ¶ 18,229.
[157] No. 91-0231B, 1992 U.S. Dist. LEXIS 10183 (D.R.I. June 16, 1992).
[158] 28 U.S.C. § 1603 (1988).
[159] *Id.*
[160] *Id.*
[161] 961 F.2d 195 (Fed. Cir. 1992).

on this understanding, the plaintiff entered a high bid of $38,000.00 and tendered a $5,000.00 deposit. Thereafter, he was advised that the FAA would *not* issue an airworthiness certificate but, that, only a ferry certificate would be issued, allowing him to either export the aircraft from the United States or to fly it to a facility where the aircraft would be dismantled. It was alleged that the market value of the aircraft with an airworthiness certificate was $140,000.00, but without such a certificate only, $5,000.00.

The plaintiff filed suit in federal court in California alleging numerous claims, including damages under the Federal Tort Claims Act (FTCA).[162] The matter subsequently was transferred to the Southern District of Florida and then to the Court of Claims on the basis of absence of subject matter jurisdiction.[163] This action was appealed and the appellate court analyzed whether the actual claim being made by the plaintiff sounded in contract or in tort and, in particular, focused on whether specific performance could be accomplished. The court concluded that the relief being requested was not applicable under the FTCA since it needed to be controlled by contract law.[164] Specific performance therefore could not apply, and the court upheld transfer to the Court of Claims.[165]

The plaintiff in *Berkman v. United States*[166] allegedly slipped and fell on hydraulic fluid which had leaked from a mobile transfer lounge at Dulles International Airport and subsequently sued the FAA on the basis that it owned and operated the airport facilities and thus, should be liable under the FTCA.[167] The trial court dismissed the claim on the basis that the negligence, if any, rested with an independent contractor which was under contract to clean and maintain the airport facilities. The Fourth Cir-

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[162] 28 U.S.C. §§ 1346(b), 2671-80 (1988).
[163] *Wood*, 961 F.2d at 197.
[164] *Id.* at 199.
[165] *Id.* at 200.
[166] 957 F.2d 108 (4th Cir. 1992).
[167] 28 U.S.C. §§ 1346(b), 2671-80 (1988).

cuit Court of Appeals concluded that sovereign immunity under the FTCA excludes liability based solely on the negligence of an independent contractor regardless of what state law would hold.[168] The court also held that an agency theory provided no basis to have imputed the negligence of the independent contractor to the FAA.[169] The appellate court remanded the case, however, to determine whether there was any independent indirect negligence of the FAA.[170] Apparently, there was insufficient information on the record to rule as a matter of law that no independent negligence on the part of FAA employees existed.

Bell Helicopter Textron, Inc. v. United States[171] involved the crash of a helicopter which was operated by the National Oceanic and Atmospheric Administration (NOAA). The passenger, a civilian employee of NOAA, filed suit against the manufacturer, seller and lessor of the helicopter and the claim subsequently was settled. Thereafter, the defendants sued the United States under the FTCA claiming entitlement to indemnity on the basis that the pilot, a federal employee, was negligent in the manner in which he operated the helicopter. The Court of Appeals for the Ninth Circuit affirmed the granting of a motion for summary judgment in favor of the government concluding that employers were granted immunity under the Alaska Workers' Compensation Act[172] and therefore the claims for implied contractual indemnity and non-contractual indemnity were barred.[173]

The decedent in *Reiser v. United States*[174] was a 33 year old single female who was piloting an aircraft which crashed, and the injuries she sustained subsequently brought about her death. The Administrator of her Es-

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[168] *Berkman*, 957 F.2d at 113.
[169] *Id.* at 113-14.
[170] *Id.* at 114-15.
[171] 967 F.2d 307 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 964 (1993).
[172] *Id.* at 308 (citing ALASKA STAT. § 23.30.055 (1990)).
[173] *Id.* at 308-09.
[174] 786 F. Supp. 1334 (N.D. Ill. 1992).

tate, her father, filed a wrongful death action under the FTCA contending that the negligence of air traffic control personnel caused her death. The case was tried to the court alone, which applied the Illinois law. Under Illinois law, elements of damages include the loss of the decedent's love, affection, care, attention, companionship, comfort, guidance and protection.[175] Further, the individuals entitled to recovery were the "next of kin" which included the decedent's parents and four siblings.[176]

The court concluded that the contributory negligence of the decedent was ten percent and thus, proceeded to evaluate the damages due the estate. In a detailed opinion reviewing the value of the decedent to her family, including descriptions that she was the "glue that held the family together,"[177] the court concluded that the mother and father each sustained an annual loss in the amount of $8,750 and multipled this amount by their life expectancy.[178] The siblings sustained annual losses ranging from $8,750 to $10,000 and, using similar life expectancy numbers, calculated a total net award in the amount of $1,814,493.30.[179]

Koohi v. United States[180] involved the death of the plaintiff's decedent as a result of the firing of a missile from the USS VINCENNES, a United States Navy cruiser, on July 3, 1988. The missile struck a civilian Iranian Airbus. Two-hundred and ninety persons aboard the aircraft died. Claims were made under the Federal Tort Claims Act against the United States and certain defense contractors involved with the Aegis Air Defense System, the system responsible for firing the missile. The court took judicial notice of the "tanker war"[181] and concluded that suits against the United States based on claims "arising out of

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[175] Singh v. Air Ill., 520 N.E.2d 852 (1988).
[176] *Reiser*, 786 F. Supp. at 1335.
[177] *Id.* at 1338.
[178] *Id.* at 1339.
[179] *Id.* at 1339-40.
[180] 976 F.2d 1328 (9th Cir. 1992).
[181] *Id.* at 1330 n.1.

combatant activities of the military or naval forces . . . during time of war"[182] were prohibited. Accordingly, the tanker war although not declared, was part of larger hostilities and would preclude recovery under the Federal Tort Claims Act against the United States and shield defense contractors from liability.

B. Air Traffic Control

In *Budden v. United States*[183] the crash of a helicopter ambulance in inclement weather resulted in the death of the pilot and two nurse passengers. The claims against the United States related to the negligent provision of weather data to the pilot over the telephone by an FAA flight service specialist. The lower court concluded that the cause of the accident was the pilot's flying into deteriorating weather conditions and the actions of the flight service specialist were appropriate. The appeal dealt with the issue of whether the flight service specialist was under a duty to advise the pilot of forecasted low ceilings. The transcript of the taped telephone briefing included a request by the pilot for information relating to any "significant weather moving through that area in the next hour and a half."[184] The appellate court concluded that this was a very specific inquiry regarding weather conditions along the intended route and the failure of the flight service specialist to fully brief the pilot in response to this inquiry constituted negligence.[185] Accordingly, the lower court decision in favor of the United States was reversed and the case remanded on the issue of causation. On remand the court also addressed whether the pilot's conduct precluded recovery despite a conclusion that the actions of the flight service specialist constituted negligence.[186]

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[182] *Id.* at 1333 (citing 28 U.S.C. § 2680(j) (1988)).
[183] 963 F.2d 188 (8th Cir. 1992).
[184] *Id.* at 189.
[185] *Id.* at 193-94.
[186] *Id.*

Pan American World Airways, Inc. v. Port Authority of New York and New Jersey[187] involved an action brought by Pan Am against the United States and The Port Authority for damage to the engine and hull of a DC-10 aircraft. The damage occurred when the pilot was required to place the engines in reverse thrust because of a near collision with sanding equipment on one of the taxiways. The crew of the DC-10 indicated that they first noticed the sanding equipment on the grassy part of the airport near the intersection of two taxiways, and when the aircraft was approximately 70 to 100 feet from this intersection, the sand trucks started in motion and sped across the path of the aircraft. The pilot initially applied brakes, but because of the icy condition of the taxiway, the brakes did not effectively slow down the aircraft and thus, the pilot put the engines into reverse thrust. Damage to the engines and hull resulted.

The plaintiff presented the case against the Port Authority to a jury and argued a parallel non-jury trial against the United States. At the completion of the plaintiff's case, the court granted judgment in favor of both defendants on the basis that the plaintiff had failed to prove a *prima facie* case.[188] The court, in its findings, concluded that the advice given by the air traffic controller that sand trucks were in the vicinity of the taxiway sufficiently alerted the crew that there may be a requirement to stop quickly.[189] The version of the air crew regarding the actions of the sanding crew was apparently not credible.

The Second Circuit Court of Appeals reversed the district court.[190] The Court of Appeals held that the plaintiff presented enough evidence for the jury to decide that the Port Authority negilently maintained the runways and op-

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[187] 787 F. Supp. 312 (E.D.N.Y. 1992), *rev'd*, 995 F.2d 5 (2d Cir. 1993).

[188] *Id.* at 313.

[189] *Id.* at 319.

[190] Pan Am. World Airways, Inv. v. Port Auth., 995 F.2d 5 (2d Cir. 1993).

erated the sand trucks.[191] The Second Circuit, however, agreed with the district court's order which refused to qualify Pan Am's expert witness.[192] The Second Circuit reversed the district court and remanded the case for a new trial.[193]

Pettorini v. United States[194] involved the crash of a Piper aircraft piloted by an individual qualified for flight solely under visual flight rules. The evidence reflected that the flight was commenced in marginal VFR conditions and shortly thereafter the weather deteriorated to IFR conditions. The pilot never declared an emergency and at no time did the air traffic controllers ever fail to provide any assistance *requested* by the pilot. Although the air traffic controllers may have become aware of the pilot's difficulties operating his aircraft, the court concluded that their failure to take more aggressive action did not constitute a proximate cause of the crash.[195] Accordingly, the court entered judgment in favor of the United States.[196]

Nakajima v. United States[197] was a claim under the Federal Tort Claims Act by the estate of a pilot of a helicopter involved in a mid-air collision. The collision occurred when an airplane travelling above and behind the helicopter collided with it. The court concluded that although the helicopter pilot had a duty to "see and avoid" the airplane, this constituted a physical impossibility, based on the position of the aircraft. The court, therefore, found it inappropriate for the helicopter pilot to take extraordinary measures looking for something that he did not know to have been there.[198] The court distinguished *United States v. Miller*,[199] as applying to an overtaking air-

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[191] *Id.* at 9.
[192] *Id.* at 10.
[193] *Id.*
[194] 23 Av. L. Rep. (CCH) ¶ 18,397 (S.D. Fla. May 7, 1992).
[195] *Id.* ¶ 18,405.
[196] *Id.* ¶ 18,406.
[197] 965 F.2d 987 (11th Cir. 1992).
[198] *Id.* at 989.
[199] 303 F.2d 703 (9th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).

craft and thus, found it inapplicable to the decedent.[200]

Barnard v. United States[201] involved the crash of a twin engine aircraft following an encounter with adverse weather conditions. The crash resulted in two deaths. The court analyzed the duty of air traffic controllers to provide weather information. Citing *Barbosa v. United States*,[202] the court concluded that the pilot in command was responsible for the manner in which the aircraft was flown and this responsibility included being aware of, and avoiding, dangerous weather conditions.[203] Specifically, the pilot in question did not ask for any additional assistance from the controllers and apparently either mishandled the plane or encountered weather so severe that it exceeded the plane's limitations. The court concluded that the evidence was insufficient to show that the air traffic controllers either violated their duties or took action which brought about the crash of the aircraft.

C. Customs Agents

Attallah v. United States[204] arose out of the robbery and murder of a courier in 1982. The decedent was transporting currency and other assets on behalf of the plaintiff in the approximate amount of $694,000. Two United States Customs Service agents illegally abducted the courier, stole the assets and murdered him. Approximately ten days later, the body of the courier was found, however it was not until approximately four and a half years later that the customs agents were indicted. The plaintiff filed this suit against the United States seeking to recover damages for the theft of the property.

The United States initially defended on a theory that the claims were time-barred in that they were not filed until more than two years after the alleged tortious conduct.

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[200] *Nakajima*, 965 F.2d at 989.
[201] 24 Av. L. Rep. (CCH) ¶ 17,125 (D. Colo. 1992).
[202] 811 F.2d 1444 (11th Cir. 1987).
[203] *Id.* at 1445.
[204] 955 F.2d 776 (1st Cir. 1992).

The appellate court easily dealt with this defense, concluding that the discovery rule applied and that plaintiff had insufficient knowledge or reason to know of the cause of action until the criminal indictments were returned, and thus, the claim was not time-barred.[205] The appellate court did conclude, however, that the actions of the agents were clearly beyond the scope of their employment on behalf of the United States government and thus, the tortious conduct could *not* be attributable to the United States.[206] The court also dismissed the plaintiff's argument that other customs agents were negligent in not performing their duties properly by failing to uncover the malicious intentions of the culpable agents.[207] The appellate court concluded that the discretionary function exception applied and thus, the claim should be dismissed for lack of subject matter jurisdiction.[208] The appellate court affirmed the court's granting of summary judgment on behalf of the United States.[209]

In a detailed factual review of the actions of certain customs agents at Boston's Logan Airport, the court in *Adedeji v. United States*[210] concluded that the United States had undertaken tortious conduct against an arriving airline passenger without probable cause and awarded her $215,000. The facts involved the arrival of this Nigerian national on a round trip Boston to Nigeria vacation. Upon her return from Nigeria with one suitcase, she was questioned by a customs agent. Based on what were considered to be non-responsive or evasive answers, she underwent progressive interrogation and searches by various agents. Ultimately agents strip-searched her and transported her to a local hospital where her body cavities were visually inspected, ultimately undergoing abdominal x-rays. In spite of the interrogation and searches, no evi-

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[205] *Id.* at 780.
[206] *Id.* at 780-82.
[207] *Id.* at 782-84.
[208] *Id.* at 783.
[209] *Attallah*, 955 F.2d at 768.
[210] 782 F. Supp. 688 (D. Mass. 1992).

dence of any contraband was ever found. Consequently, she filed suit shortly thereafter. The court concluded that due to the conduct of the customs agents, the plaintiff had sustained post traumatic stress disorder which required psychiatric treatment.[211] The court awarded $200,000 for past and future pain and suffering and $15,000 for past and future psychiatric care.[212] The court declined to award attorneys' fees.[213]

IV. INSURANCE

A. CONTRACT LANGUAGE

In *Truck Insurance Exchange v. Waller*[214] the passenger in a private aircraft owned and operated by the insured was injured in the crash of the aircraft. The passenger successfully recovered a verdict against the owner/operator. The plaintiff then attempted to collect the monies under a farm insurance policy issued to the owner/operator. The insurance policy had certain exclusions relating to the operation of aircraft. The insurance company filed a declaratory judgment action and its own insured admitted that no coverage existed under the policy. The passenger maintained standing, however, and contested this interpretation of the policy.

The general language of the policy excluded coverage for bodily injury arising from the "ownership, maintenance, operation, use, loading or unloading of . . . aircraft."[215] In regard to employees, however, injuries were excluded only if arising from the operation or maintenance of the aircraft. This "buy back" was deemed by the court *only* to apply to employees, while the general exclusionary language of the policy relating to *all* aspects of the operation of an aircraft applied to third parties such as the

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[211] *Id.* at 701.
[212] *Id.* at 703.
[213] *Id.* at 703 n.29.
[214] 828 P.2d 1384 (Mont. 1992).
[215] *Id.* at 1386.

plaintiff/passenger.[216] Accordingly, the court affirmed the lower court's decision granting summary judgment in favor of the insurance company.[217]

In *Miller v. Principal Mutual Life Insurance Co.*[218] the plaintiff's decedent was an employee of a construction company. The company owned a Beechcraft Queen Air that it used for business purposes. The decedent, through his employment status, received certain accidental death benefits; however the pertinent language of the policy excluded coverage when the contributing cause of the death involved certain aeronautic activities unless the decedent was a passenger on a commercial aircraft. The decedent died as a result of a crash of the company Queen Air. The insurance company denied coverage under this exclusion on the basis that the company aircraft did not constitute a commercial aircraft. The court concluded that the language was not ambiguous and that it was clear under the facts of this case and the manner in which the Queen Air was operated, that it did not constitute a commercial aircraft and thus, coverage was not provided.[219]

The insured/defendant in *United States Fire Insurance Co. v. Mobley*[220] entered into a contract with the City of Madras and Jefferson County, Oregon, to manage a municipal airport. Pursuant to the agreement between Mobley and the government bodies, he leased the airport premises "to carry on the responsibilities of airport manager."[221] The premises were to be used "only for a commercial operation of aircraft,"[222] including, however, "pilot training, aircraft rental, FAA certified air charter and FAA certified maintenance and inspection."[223] The lease further stated that the landlord-governments "shall

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[216] *Id.*
[217] *Id.*
[218] 791 F. Supp. 858 (M.D. Fla. 1992).
[219] *Id.* at 861.
[220] 784 F. Supp. 782 (D. Or. 1992).
[221] *Id.* at 783.
[222] *Id.* at 783-84.
[223] *Id.* at 784.

provide airport general liability insurance, hangar keeper's liability insurance, premises liability insurance for fuel operation, and insurance required on jet fuel truck with the Tenant as an additional named insured."[224] Finally, the lease provided that Mobley's "business is entirely separate from the initial business of the City of Madras and the County of Jefferson."[225] The municipalities did *not* intend flight instruction to be provided as part of the municipalities' service; however, they did require that Mobley provide this service on his own.

On June 9, 1987, a student pilot landed at the airport with her flight instructor. The instructor had become ill during the course of the flight and required hospitalization upon landing. The student pilot sought permission from Mobley, a certified flight instructor, to fly solo to her home airport. Mobley endorsed the student pilot's log book and upon return to her home airport, the student's aircraft crashed short of the runway and she sustained serious injuries. The insurance company filed a declaratory judgment action claiming it had no duty to defend Mobley under the policy. The insurance policy expressly covered acts of Mobley that resulted from using the premises for operations "necessary or incidental" to the use of the municipal airport.[226] The court believed that the language of the policy was ambiguous and interpreted it against U.S. Fire, concluding that reasonable minds could find coverage for Mobley's actions as the fixed base operator, including his activities as a certified flight instructor.[227] Accordingly, the court held that U.S. Fire had a duty to defend Mobley in the underlying tort litigation.[228]

In *Dinocenzo v. Aitken*[229] the Arizona appellate court, applying Alaska law, found that an airplane carcass, used as a source for spare parts, was part of the business opera-

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[224] *Id.*
[225] *Id.*
[226] *Id.* at 785.
[227] *Id.*
[228] *Id.* at 786.
[229] 827 P.2d 478 (Ariz. Ct. App. 1991).

tions of a carrier and should be covered under its aviation *premises liability* policy.[230] The underwriters took the position that the carcass was an aircraft, in spite of the fact that it did not have wings, engines or instruments and thus, its loss was specifically excluded. The court used the definition of "aircraft" in the dictionary[231] and concluded that the carcass in question may once have been an aircraft, but when it was no longer capable of flight, it could not reasonably be classified as such.[232] As a result, coverage was found under the premises liability policy.[233]

R.L.I. Insurance Co. v. Kary[234] involved a declaratory judgment action claiming that the spouse of the insured pilot should not be able to recover under a policy because her marital relationship specifically excluded her from recovering for injuries sustained in the accident. The pertinent policy language stated that it did not insure for any bodily injury to the "insured" which further was defined as including "the spouse of any person named in Item 1, if that spouse resides in the same household as the person."[235] The injured spouse contended that since her husband and another insured had been lumped together in the policy as "insured" and "you," and she was not the spouse of the other individual, the definition was ambiguous and should be construed against the insurer. She also argued that since interspousal immunity in tort actions had been abrogated in Kansas, such exclusionary attempt was contrary to public policy. The court found the language unambiguous and excluded the claim made under the precise language of the policy.[236]

United States Aviation Underwriters, Inc. v. United Coconut

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[230] *Id.* at 479.

[231] *Id.* The dictionary referenced by the court defined "aircraft" as "any machine or device, including airplanes, helicoptors, gliders and dirigibles capable of atmospheric flight." AMERICAN HERITAGE DICTIONARY 27 (1969).

[232] *Id.*

[233] *Id.*

[234] 779 F. Supp. 1300 (D. Kan. 1991).

[235] *Id.* at 1302.

[236] *Id.* at 1303.

Chemical, Inc.[237] involved the notice requirements under the war risk clause of the policy.[238] The insured owned and operated a Dassault-Brequet Falcon 50 Landplane in Southeast Asia, which was registered under the laws of the Philippines. Pursuant to an Executive Order of the Philippine government, the Falcon was sequestered, and though the record is not clear, apparently was released several months thereafter. Approximately ten months after the sequestration order, the insured filed a claim under the policy declaring a "loss" of the aircraft. The underwriters filed suit contending that the ten month delay in giving notice was, as a matter of law, an unreasonable amount of time, and thus, no coverage should apply. This specific notice requirement of the policy provided that the insured was required to provide written notice of a loss "as soon thereafter as possible."[239] The court concluded that precisely what reasonably amounted to "as soon thereafter as possible" was a question of fact, and thus, denied the motion for summary judgment, submitting that the question must be decided by a jury.[240] The reader should note a related case discussed previously in this paper.[241]

B. DAMAGES

Certain Underwriters at Lloyd's of London v. Pacific Southwest Airlines[242] involved a declaratory judgment action to determine whether coverage existed under a policy of insurance issued to defendant Pacific Southwest Airlines. A commercial airline pilot, formerly employed by Pacific Southwest Airlines (PSA), made a claim for personal inju-

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[237] No. 87 Civ. 5684, 1992 WL 122787 (S.D.N.Y., May 22, 1992).

[238] The policy provided insurance coverage against war risks, defined as "Capture, seizure, arrest, restraint or detention or the consequences thereof or of any attempt thereat, or any taking of the property insured or damage to or destruction thereof . . . by any Government or governmental authority or agent." *Id.* at * 1.

[239] *Id.*

[240] *Id.* at *4.

[241] *See* Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines, 965 F.2d 1375 (5th Cir. 1992).

[242] 786 F. Supp. 867 (C.D. Cal. 1992).

ries and emotional distress that he allegedly suffered in the course of his employment due to exposure to a harmful chemical routinely used as a rain repellant on the aircraft which he operated. The matter was tried in a California state court and the jury returned a verdict against PSA in the amount of $100,000 in compensatory damages and $2,000,000 in punitive damages. U.S. Air was the successor of PSA by merger and, in this capacity, was involved in the litigation.

One issue in the declaratory judgment action was whether the California Insurance Code[243] prohibited indemnification of punitive damages in successor liability cases. A subsidiary issue related to a claim of estoppel on the basis that the underwriters did not fully inform U.S. Air of certain conflicts of interest relating to the law firm which it had retained to defend U.S. Air and review the coverage issue. In a detailed analysis, the court concluded that the California law clearly prohibited indemnification of punitive damages in successor liability cases where the merger put the successor on notice that it was purchasing subject to the predecessor's liabilities or where the predecessor was a significant, identifiable portion of the successor.[244] The court emphasized that the theory of punitive damages punishing the wrongdoer was consistent with denying U.S. Air's claim that insurance coverage should be applicable.[245]

The second aspect of the case related to the fact that the underwriters retained a law firm to represent U.S. Air in the underlying tort action and retained the same firm as coverage counsel. While a clear conflict of interest existed, the court went further to analyze whether the underwriters should be estopped from denying the coverage under these circumstances as being against public pol-

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[243] CAL. INS. CODE § 533 (West 1972) (stating that "[a]n insurer is not liable for a loss caused by the wilfull act of the insured").

[244] *Pacific Southwest Airlines*, 786 F. Supp. at 871.

[245] *Id.*

icy.[246] Returning to the California Insurance Code, the court concluded that the underlying policy considerations of punishing the wrongdoer took precedence over this potential estoppel and thus, the public policy argument prevailed, and the court denied that the underwriter should be estopped.[247] Accordingly, the court held U.S. Air liable for the entire $2,000,000 in punitive damages.[248]

The underlying facts of *Avemco Insurance Co. v. Cessna Aircraft Co.*[249] related to the crash of a Cessna 180 that was owned and operated by a Mr. Goodfellow and insured by Avemco. One of the injured passengers sued Cessna, which brought a third-party action against the owner-operator. Another injured passenger also made a claim against the owner-operator, who, through Avemco, settled the claim for the policy limits of $102,500. Thereafter, Avemco instituted this litigation against Cessna claiming entitlement to contribution or indemnification for the monies it paid on the settled passenger claim.

Cessna initially took the position that since Avemco was subrogated to the claim of its insured, and the insured failed to crossclaim against Cessna in the underlying litigation, Avemco should be deemed to have waived any such entitlement. The court concluded that it was not the owner-operator who possessed the claim for indemnification but rather the insurance company, which was acting as a surety rather than a subrogee.[250] Accordingly, the owner-operator did not have a claim for indemnity but rather this rested solely in the hands of the insurance company, which was not a party, and thus not able to make such a claim in the original litigation. The instant claim for contribution or indemnity was therefore not waived.

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[246] *Id.* at 873.
[247] *Id.* at 872.
[248] *Id.*
[249] 780 F. Supp. 788 (D. Utah 1991).
[250] *Id.* at 790.

Cessna next argued that the release entered into between the passenger and the owner-operator and Avemco was such that it did not release Cessna from the claim of the passenger and thus, there was no right to contribution or indemnification. Cessna admitted in the litigation that, had it been sued by the passenger, it would have raised the terms of the release as an affirmative defense in precluding any further payment to that passenger. The court therefore concluded that the release discharged Cessna from any liability to the passenger and therefore, the claim for contribution or indemnity was appropriate.[251] The final aspect of the decision related to whether prejudgment interest would be appropriate, and the court indicated that this was not a personal injury claim *per se*, but rather one in which the amount of damages was fixed and under Utah law,[252] prejudgment interest would be recoverable.[253]

C. Pilot Issues

Safeco General Insurance Co. of America v. Davis[254] involved the issue of coverage regarding the pilot warranty provision of the policy. The aircraft in question was to be used for agricultural flying. The policy did not provide coverage while the aircraft was in motion "unless there was a pilot at the controls who met the requirements of the Aerial Applicator Pilot Standards."[255] The accident which was the subject of the insurance coverage dispute occurred when the pilot was unable to start the aircraft from the cockpit and attempted to do so by manually rotating the propeller. The aircraft ultimately started; however, before the pilot could return to the cockpit, the plane ran into a utility pole and sustained significant damage. The insureds took the position that the propeller constituted

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[251] *Id.* at 791.
[252] Canyon Country Store v. Bracey, 781 P.2d 414, 422 (Utah 1989).
[253] *Cessna Aircraft*, 780 F. Supp. at 791.
[254] No. CA 91-253, 1992 WL 103726 (Ark. Ct. App., May 6, 1992).
[255] *Id.* at *1.

"controls" for purposes of the alleged exclusion and the coverage should be available. In the alternative, the language was ambiguous and coverage should be decided by a jury. The trial court allowed the matter to proceed to the jury verdict which found that there was a pilot at the controls of the aircraft at the time of the accident.[256] The appellate court affirmed.[257]

In *A.D. Desmond Co. v. Jackson National Life Insurance Co.*[258] the plaintiffs' decedent had been the named insured under a life insurance policy issued by the defendant, and the plaintiff sought coverage following the death of the decedent when the decedent crashed in a recently purchased experimental aircraft. The underwriters denied coverage on the basis that the decedent had made material misrepresentations in his application for life insurance, particularly in regard to his past experience relating to flying ultra-light planes. The plaintiffs contended that the questionnaire, which was part of the policy, contained ambiguous language, and any inconsistencies in the answers provided by the decedent should not be concluded to be material misrepresentations; therefore coverage should apply.

The court agreed with the plaintiffs, concluding that the questionnaire, including subsequent questionnaires required to be filled out, were ambiguous in that a layman would not be able to ascertain precisely what was required to be divulged to the underwriters.[259] In particular, the evidence showed that the decedent had flown ultra-lights for six years before the accident but, the answers to the questionnare never revealed this fact. A hazardous activities questionnaire covered ultra-light flying whereas an aviation activities questionnaire inquired as to flying experience. Taking this into account, in a light most favorable to the decedent, the court concluded that the information

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[256] *Id.* at *2.
[257] *Id.* at *4.
[258] 585 N.E.2d 1120 (1992).
[259] *Id.* at 1124.

provided in response to this specific question was not materially misleading and thus, the defendant underwriters were responsible for the death benefits.[260]

D. DUTIES

In *Dempsey v. Associated Aviation Underwriters*[261] plaintiff brought a state court action against the manufacturer of an aircraft involved in an accident along with the operator of the aircraft and other defendants. The manufacturer entered into a joint tortfeasor release with the plaintiff for $300,000, and the state court action proceeded against the other defendants. Following settlement and receipt of the funds, the plaintiffs alleged that they discovered information concerning the existence of a draft service bulletin which should have been produced in discovery prior to the settlement. The plaintiffs contended that had they been aware of this document, the settlement value of the case against the manufacturer would have been greatly increased.

They commenced a federal court action thereafter to retain the settlement proceeds of $300,000 and receive additional damages because of the alleged wrongful nondisclosure of the draft service bulletin. The plaintiffs also named as defendants in the federal action the underwriters of the manufacturer and the claims manager handling the account. The parties concluded that Pennsylvania law was applicable and the court ruled that the powerful public interest in settlements was such that it was imperative the settlement in this case should be enforced.[262] Of some note was the fact that plaintiffs were attempting to retain the $300,000 and to obtain an additional $1.7 million dollars in compensatory damages and punitive damages in excess of $25 million dollars.

Of further interest, however, was the analysis of the claims against the underwriters and claims manager. The

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[260] *Id.*

[261] 141 F.R.D. 248 (E.D. Pa.), *aff'd*, 977 F.2d 567 (3d Cir. 1992).

[262] *Id.* at 249.

court determined, through evidence, that the manufacturer had an arrangement with a nine figure retention for both losses and defense costs which were applicable to the plaintiffs' claims. Accordingly, the negotiations between Cessna's counsel and the plaintiffs' counsel had no financial bearing on the underwriters' exposure. Thus, the motion to dismiss on behalf of both was granted.[263] Finally, the court commented on the "apparent blood feud" between the underwriters and plaintiffs' counsel.[264] In reviewing the Rule 11 motion for sanctions, the court denied the cross-motions.[265]

V. PRODUCTS LIABILITY

A. WARNINGS

Williamson v. Piper Aircraft Corp.[266] was a complicated factual and legal case involving the crash of a Piper Malibu resulting in injuries and two deaths. Initially, the litigation proceeded against the manufacturers of the aircraft (Piper) and the engine Teledyne Continental Motors (TCM). Plaintiff joined additional parties, including the United States and Parker-Hannifin (Parker), the manufacturer of the stand-by vacuum pump. After significant discovery, TCM settled with the personal injury plaintiffs for a total of $12.5 million and then sought contribution and indemnity from the other defendants and third-party defendants. The trial proceeded with TCM producing evidence in support of a products liability theory against Piper and Parker and a negligence theory against the air traffic controllers. Ultimately, the court directed a verdict against TCM on its indemnity claim, but submitted the contribution claim to the jury.[267] The jury returned a verdict apportioning liability with forty-one percent to TCM, forty-seven percent to Piper and twelve percent to

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[263] *Id.* at 252.
[264] *Id.* at 253.
[265] *Id.*
[266] 968 F.2d 380 (3d Cir. 1992).
[267] *Id.* at 382.

Parker.[268] The court denied the claim against the United States.[269] Post-trial motions were denied, an order on the verdict was entered, and Parker appealed on the basis that, under Pennsylvania law, a component manufacturer could not be found strictly liable for an alleged failure to provide written instructions to the product manufacturer (Piper) regarding the manner in which the pump should be installed.[270]

The Court of Appeals for the Third Circuit analyzed Pennsylvania law and, contrary to Parker's contentions, concluded that Parker was more than a mere manufacturer of a component and distinguished the facts of this case from recent Pennsylvania decisions.[271] In fact, the court recognized that TCM had articulated its case against Parker on a failure to warn theory as well as a defect in the design of the pump. TCM contended that the engine failure was brought about by a leakage of engine oil caused by the improper design of the stand-by vacuum pump and the inadequate installation instructions Parker provided to Piper. On this basis, Parker was more than a mere component manufacturer since the stand-by vacuum pump was made specifically for use by Piper on the Malibu. The Court affirmed the judgment entered by the lower court sustaining the verdict.[272]

Of additional interest in this case is that shortly after the judgment was entered, Piper filed for relief under Chapter 11 of the Bankruptcy Code and TCM thereafter filed a motion to require Parker to assume a larger portion of the shortfall created by Piper's bankruptcy. The court of appeals did not rule on TCM's request to mold the verdict, but rather indicated that the trial court should act on this request. As of this date, no action has been

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[268] *Id.*

[269] *Id.* at 383.

[270] *Id.*

[271] Jacobini v. V. & O. Press Co., 588 A.2d 476 (Pa. 1991); Mackowick v. Westinghouse Elec. Corp., 575 A.2d 100 (Pa. 1990); Wenrick v. Schloemann-Siemag Aktiengesellschaft, 564 A.2d 1244 (Pa. 1989).

[272] *Williamson*, 968 F.2d at 387-88.

taken by the trial court, although initially, it indicated that if jurisdiction was returned to the district court it would likely grant such a motion and mold the verdict. The position of TCM is that it should receive credit for fifty percent of the monies owed by Piper or, in the alternative, Parker should be required to pay twelve percent of the Piper share based on the jury's finding that Parker was liable for twelve percent of damages sustained.

In *Alexander v. Beech Aircraft Corp.*[273] a Beech Musketeer was rented and flown from Alabama to Illinois where it ultimately ran out of fuel and, in the course of its landing, killed the pilot, one passenger and seriously injured a second passenger. The aircraft was manufactured by Beech in 1967. Suit was filed in the United States District Court for the District of Kansas which, under a choice of law analysis, determined that the law of Indiana would apply. In particular, Indiana had a ten year statute of repose for a products liability cause of action.[274] Defendant, Beech contended that the statute was applicable and, the claims were barred. Plaintiffs contended that the pilot/operator manual that Beech published in December 1979 should be considered as a replacement part and thus, the ten-year statute of repose did not begin to run until 1979.

It was the factual theory of the plaintiffs that the information provided in the handbook was defective and misrepresented the amount of usable fuel within the aircraft. Since the evidence showed that the cause of the accident was insufficient fuel, the handbook clearly was instrumental in causation. Accordingly, when the new handbook was issued in 1979, a new ten-year period began to run. The court reviewed the replacement part theory and concluded that it was not applicable as the case still amounted to a failure to warn, which Indiana law held was within the ten-year statute of repose.[275] The plaintiffs also argued that the law of Kansas should not apply the Indiana stat-

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[273] 952 F.2d 1215 (10th Cir. 1991).
[274] *Id.* at 1218.
[275] *Id.* at 1220.

ute of repose since it employed a "discovery rule." This argument also was denied by the Court.[276]

B. DAMAGES

Butchkosky v. Enstrom Helicopter Corp.[277] involved the crash of a helicopter during a sight-seeing tour and the application of the "economic loss rule" under Florida law. Citing *East River Steamship Corp. v. Transamerica Delaval, Inc.*,[278] the court distinguished the facts of this case.[279] While ordinarily economic losses are not recoverable in a tort action, when there is no contractual remedy available to a plaintiff who suffers such a loss, then economic losses between parties could be established through the filing of an action in tort under a product liability theory of recovery.[280]

In *Walton v. Avco Corp.*[281] plaintiffs' decedents were killed in a helicopter crash which occurred when the engine seized in mid-flight following the failure of the oil pump due to a previously known defect. The oil pump was a component of the engine which was manufactured by Avco Corporation (Avco), and which was incorporated into the helicopter, manufactured and sold by Hughes Helicopter, Inc. (Hughes). Over two years prior to the crash, Avco issued a service instruction to Hughes advising the helicopter manufacturer of the defect in the oil pump and detailing a procedure for correcting the problem at the next scheduled overhaul. However, Hughes did not advise the helicopter's owner or its authorized service centers about the problem, and the defect in the oil pump had not been corrected at the time the helicopter was overhauled thirteen months after Avco issued the service instruction.

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[276] *Id.* at 1226.
[277] 784 F. Supp. 882 (S.D. Fla. 1992).
[278] 476 U.S. 858 (1986).
[279] *Butchkosky*, 784 F. Supp. at 883.
[280] *Id.* at 884-85.
[281] 610 A.2d 454 (Pa. 1992).

Avco settled with plaintiffs prior to trial and obtained releases which specifically preserved its right to seek contribution from Hughes. Following trial, the jury determined both Avco and Hughes were strictly and primarily liable to plaintiffs. The jury found that the engine manufactured by Avco was defective in design, and that such defect was a substantial contributing factor in causing the accident and the resulting deaths of plaintiffs' decedents. The jury also determined that Hughes' failure to warn the helicopter's owner and its authorized service centers was an independent design defect and a substantial contributing factor to the accident and the resulting deaths. However, the jury awarded damages to plaintiffs in amounts which were less than the settlements obtained from Avco. The trial court thereafter granted Avco's post-trial motion seeking contribution from Hughes and awarded Avco one-half the jury verdict. The court denied plaintiffs' claim to receive a portion of the jury verdict from Hughes.

On appeal, the Supreme Court of Pennsylvania initially upheld independent liability by Hughes based upon the failure of Hughes to warn its service centers and those who purchased its helicopters of the known defect.[282] The court concluded that the fact that Avco, and not Hughes, built the defective engine did not relieve Hughes of its duty to warn.[283] The duty began with the incorporation by Hughes of the defective engine into its helicopters.[284] Accordingly, the court held Hughes was not entitled to indemnification from Avco.[285]

The court then addressed to whom Hughes owed its share of the damages. In that regard, the court noted a settling joint tortfeasor has a right to contribution against a non-settling joint tortfeasor only where the settling tortfeasor discharges the liability of the other joint

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[282] *Id.* at 460.
[283] *Id.* at 459.
[284] *Id.*
[285] *Id.* at 460.

tortfeasor.[286] Since the releases entered into by Avco and the plaintiffs did not also release Hughes from liability, Avco was not entitled to contribution toward the settlements from Hughes, and plaintiffs could obtain from Hughes its pro rata share of the verdict.[287] Lastly, the court concluded that Hughes was responsible to plaintiffs for one-half the verdict since Hughes and Avco were strictly liable to plaintiffs and thus, contribution between the joint tortfeasors could not be based upon the principles of comparative fault.[288]

C. Government Contractor Defense

The personal injury claims in *Lewis v. Babcock Industries, Inc.*[289] involved the crash of an Air Force F-111 while operating out of Lakenheath, England. Plaintiffs sued Babcock, McDonnell Douglas and General Dynamics for personal injuries sustained by the pilot when he ejected from the aircraft in the self-contained crew escape module. The facts indicated that on descent, the forward repositioning cable of the module broke, causing the crew members to sustain injury upon landing. Further, the cable apparently broke due to corrosion. The defendants filed motions for summary judgment contending that the government contractor defense established in *Boyle v. United Technologies Corp.*[290] precluded liability regarding design defects in military equipment if the defendants could show that: "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States."[291] Defendants contended that they com-

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[286] *Id.* at 461.
[287] *Id.* at 461-62.
[288] *Id.* at 462.
[289] No. 88 Civ. 1120, 1992 WL 142751 (S.D.N.Y. June 8, 1992), *aff'd*, 985 F.2d 83 (2nd Cir.), *cert. denied*, 113 S. Ct. 3041 (1993).
[290] 487 U.S. 500 (1988).
[291] *Lewis*, 1992 WL 142751, at *4.

plied with the three prong test of *Boyle*; however, the plaintiffs argued to the contrary.

Specifically, the plaintiffs contended that the second element was not met since the cable failed, indicating that it did not comply with the general performance requirements. That is, because there was an accident, it must have been brought about by the failure of the product to perform in accordance with the specifications. The court dismissed plaintiffs' contention and concluded that no performance specifications would knowingly be allowed by the government which could result in an accident.[292] To equate a product failure with the failure to comply with the military specifications was not the test under *Boyle*.[293] The court examined the evidence in this case and concluded that the Air Force was well aware of certain corrosion problems with the cable.[294] Accordingly, the defendant satisfied this element of the test, and the motion for summary judgment was granted.[295]

D. Choice of Law

In re Air Crash Disaster at Sioux City, Iowa, on July 19, 1989[296] was yet another decision arising out of this 1989 accident. The district court denied plaintiff flight attendants' motions for summary judgment.[297] Analyzing the Illinois choice of law principles,[298] the court concluded that the claims against the engine manufacturer, General Electric, were governed by the law of Ohio, the place where the allegedly defective fan was manufactured.[299] Similarly, the claims against the aircraft manufacturer were governed by the law of California where it manufactured

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[292] *Id.* at *8.

[293] *Id.*

[294] *Id.* at *9.

[295] *Id.*

[296] 781 F. Supp. 1307 (N.D. Ill. 1991).

[297] *Id.* at 1313.

[298] *See* Ingersoll v. Klein, 262 N.E.2d 593 (Ill. 1970).

[299] *In re* Air Crash Disaster, 781 F. Supp. at 1310.

the aircraft.[300] So deciding, the court went on to conclude that there were genuine issues of material fact regarding causation and intervening cause and thus, the motions for summary judgment were denied.[301]

E. EVIDENCE

Western Helicopter Services, Inc. v. Rogerson Aircraft Corp.[302] involved a petition to amend or alter an order granting a motion for summary judgment based on newly discovered evidence. Previously, a motion for summary judgment had been granted on the basis that the plaintiff would be unable to prove that the accident product was manufactured by the defendant. Thereafter, plaintiff's expert executed an affidavit indicating that after testing some additional rotor blade forks and comparing the findings with those regarding the accident, he was able to conclude that the accident product was manufactured by the defendant. The court reviewed the three-prong test to allow the relief and concluded that the plaintiff had shown that the evidence: (1) existed at the time that the summary judgment was granted; (2) could not have been discovered through due diligence; and (3) was of such import that if it had been brought to the court's attention earlier, it would have changed the disposition of the motion for summary judgment.[303] Concluding that the plaintiff had carried its burden of proof, the court opened the judgment and allowed the matter to proceed on the merits.[304]

VI. FEDERAL AVIATION ACT

A. PREEMPTION

The plaintiff's decedent in *Howard v. Northwest Airlines,*

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[300] *Id.* at 1313.
[301] *Id.*
[302] 777 F. Supp. 1543 (D. Or. 1991).
[303] *Id.* at 1545-46 (citing Jones v. Aero/Chem Corp., 921 F.2d 875 (9th Cir. 1990)).
[304] *Id.* at 1546.

Inc.[305] was to travel from Houston to Louisville with a stopover and change of planes in Memphis. Due to the decedent's poor health, the defendant was advised that its representatives would need to meet and assist the passenger in his change of planes. Apparently this was not done and the passenger remained on the continuation of the flight to Newark, New Jersey. At that point it was determined that the passenger needed medical care, and he was admitted to a local hospital. His condition deteriorated, and he was subsequently transferred by air-ambulance from the Newark hospital to one in Louisville. He died a few days later. Plaintiff sought recovery for the wrongful death of the decedent due to the negligence of the defendant in its failure to meet and assist the decedent in his transfer to the appropriate flight and its failure to provide quality medical care in Newark. Defendant moved to dismiss the case on the basis that the Federal Aviation Act[306] specifically preempted all state law claims against airlines that relate to airline carrier services. The court concluded that the claims against defendant related to airline carrier services and were preempted.[307]

Stewart v. American Airlines, Inc.[308] involved a citizen of Great Britain who allegedly was injured aboard an American Airlines flight from New York to Washington D.C., when a tire on the aircraft deflated. Suit was brought in the state court of Texas and removed pursuant to federal question jurisdiction[309] on the basis that the claim was subject to the Federal Aviation Act.[310] Removal was *not* accomplished on diversity grounds,[311] and thus, the court concluded that since diversity was not asserted in a timely

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[305] 793 F. Supp. 129 (S.D. Tex. 1992).

[306] 49 U.S.C. app. § 1305 (1988).

[307] *Howard*, 793 F. Supp. at 132 (citing Trans World Airlines, Inc. v. Mattox, 897 F.2d 773 (5th Cir. 1990), *cert. denied*, 498 U.S. 926 (1990)).

[308] 776 F. Supp. 1194 (S.D. Tex. 1991).

[309] 28 U.S.C. § 1441(b) (1988).

[310] *Stewart*, 776 F. Supp. at 196 (relying on Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987)).

[311] 28 U.S.C. § 1332 (1988).

fashion, this ground was waived.[312] The court then analyzed the issue of whether the Federal Aviation Act preempted state law claims such as the one pleaded in the instant case and concluded that the allegations of failing to properly maintain the aircraft did not equate with "services."[313] Differentiating these allegations from those in *Trans World Airways, Inc. v. Mattox*,[314] the case was remanded to the Texas state court.

Sunbird Air Services, Inc. v. Beech Aircraft Corp.[315] involved a class action suit on behalf of all owners of Beech aircraft with Pratt & Whitney PT6A, gas turbine engines that incorporated an allegedly defective Bendix pneumatic fuel control unit design. The second amended complaint alleged fraud, deceit, strict liability, negligence, breach of express and implied warranties, unjust enrichment, concert of action, civil conspiracy, fraudulent concealment, and willful, wanton and outrageous conduct in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO).[316] The specific issue before the court related to whether the Federal Aviation Act preempted plaintiffs' claims and provided exclusive jurisdiction. Defendants contended that the plaintiffs' claims constituted an impermissible collateral attack on the certification of the aircraft and engine, and the relief requested at least preliminarily required administrative action by the FAA; thus, the court lacked jurisdiction over plaintiffs' claims.

The court performed a detailed analysis of the characterization of the relief requested by the plaintiff and emphasized the fact that the second amended complaint dropped the request for a court ordered change in the design of the fuel control unit. Accordingly, the specific relief amounted to compensatory and punitive damages including diminution of the value of the aircraft as a result

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[312] *Stewart*, 776 F. Supp. at 1196.

[313] *Id.* at 1198.

[314] 897 F.2d 773 (5th Cir.), *cert. denied*, 498 U.S. 926 (1990).

[315] 789 F. Supp. 360 (D. Kan. 1992).

[316] 18 U.S.C. §§ 1961-68 (1988).

of the alleged design defect. The court concluded, therefore, that the causes of action and relief requested by the plaintiffs, did not create an irreconcilable conflict with the responsibilities of the FAA, including its desires to protect those who either fly in, or are affected by, the operation of aircraft. Further, the fact that the FAA certified the aircraft was not dispositive but merely relevant as to whether the design of the fuel control unit was defective.

A second order in the same litigation denied the defendant's motion to dismiss the counts of fraud and deceit, RICO, civil conspiracy and fraudulent concealment concluding that each count had been pleaded with sufficient particularity.[317] Citing Federal Rule of Civil Procedure 9(b), the court concluded that the allegations were specific enough to give notice to the defendants and allow them to conduct appropriate discovery.[318]

Finally, on June 10, 1992, the court entered another order granting defendants' motion to dismiss plaintiff's purported cause of action asserting a violation of federal common law.[319] The court concluded that aircraft products liability law was not an area of uniquely federal interest.[320] This case was between private parties and did not involve the rights and duties of the United States; therefore, there was no basis for creating a federal cause of action.[321]

Wolens v. American Airlines, Inc.[322] concerned a claim by certain members of the defendant's frequent flyer program. The plaintiffs claimed that retroactive changes in the program, which diminished and restricted the benefits accrued, constituted a breach of contract and violated

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[317] Sunbird Air Services, Inc. v. Beech Aircraft Corp., 789 F. Supp. 364, 366 (D. Kan. 1992).

[318] *Id.* at 366 (citing Markovich v. Vasad Corp., 617 F. Supp. 142 (E.D. Pa. 1985)).

[319] Sunbird Air Services, Inc. v. Beech Aircraft Corp., No. Civ. A 89-2181-V 1992 WL 167279 (D. Kan. June 10, 1992).

[320] *Id.*

[321] *Id.* (citing Boyle v. United Technologies Corp., 487 U.S. 500 (1988)).

[322] 589 N.E.2d 533 (1992), *vacated*, 113 S. Ct. 32 (1992).

state consumer fraud and deceptive business practices statutes.[323] The relief requested consisted of money damages and injunctive relief preventing any retroactive changes to the program. American Airlines initially removed the case to federal court on the grounds that it raised a federal question, however, the case was remanded to state court on the basis that the complaint set forth causes of action cognizable under state law. On remand, the defendant moved to dismiss because the claims relating to the defendant's rates and services were preempted by the Federal Aviation Act. On certified appeal to the Illinois Supreme Court, it was held that the injunctive relief sought constituted state interference with American Airlines' operations and that such requested action would be preempted. The remaining causes of action for breach of contract and fraud could be pursued in state court. However, the U.S. Supreme Court subsequently vacated the decision for further consideration by the Supreme Court of Illinois in light of *Morales v. Trans World Airlines, Inc.*[324]

In *Morales* the United States Supreme Court based its ruling on a permanent injunction precluding the attorneys general of 50 states, certain territories, and the District of Columbia from attempting to enforce various guidelines relating to allegedly deceptive fare advertising by the airline industry. The Supreme Court concluded that the attempts by the states involved areas preempted by the Airline Deregulation Act.[325] While the purported guidelines did not create any new laws or regulations, the requirement for disclosures and restrictions on advertising clearly impacted on airline business activities and directly conflicted with the preemptive nature of the Airline Deregulation Act.

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[323] Illinois Consumer Fraud and Deceptive Business Practices Act, ILL. ANN. STAT. ch. 815, ¶ 505/1-505/12 (Smith-Hurd 1992).

[324] 112 S. Ct. 2031 (1992).

[325] *Id.* at 203.

Miller v. Northwest Airlines[326] involved the detention of a passenger prior to boarding a domestic air flight when security personnel noted a cigarette lighter shaped like a hand gun in his attache case. While the facts were unclear as to whether the passenger was "under arrest," the legal issue involved whether the Federal Aviation Act[327] preempted the state law claim for this tortious act by security personnel. The court concluded that the allegations of the complaint were sufficient to set forth a negligent and intentional wrongdoing on the part of the airline security personnel and returned the complaint to the trial court for further proceedings.[328]

In *Harris v. American Airlines, Inc.*[329] a first-class passenger aboard a flight from Dallas, Texas, to Portland, Oregon, overheard another passenger make racially derogatory remarks toward her. She filed suit against American Airlines for violating the Oregon Public Accommodations Act,[330] for intentionally inflicting severe emotional distress and for negligence. While the court concluded that the Federal Aviation Act did not preclude the pleaded cause of action, no evidence existed that the air carrier violated this state act because the remarks were made by a passenger rather than an airline employee. Further, once the flight attendant became aware of the apparent intoxicated state of the offending passenger and his remarks, she served no additional alcoholic beverages. The plaintiff's emotional distress claim failed because providing alcoholic beverages is insufficient to support such a claim. Finally, the economic damages claim could not be supported solely by the alleged emotional injuries.

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[326] 602 A.2d 785 (N.J. Super. Ct. App. Div. 1992).
[327] 49 U.S.C. app. § 1305 (1988).
[328] *Miller*, 602 A.2d at 789.
[329] 24 Av. L. Rep. (CCH) ¶ 17,156 (D. Or. 1992).
[330] OR. REV. STAT. § 30.670 (1991).

VII. FEDERAL AVIATION ADMINISTRATION

A. ENFORCEMENT

The central issue in *Gallagher v. National Transportation Safety Board*[331] was whether the procedure in which a blood sample maintained from withdrawal to analysis in the laboratory constituted an appropriate chain of custody. The facts indicated that while the plaintiff prepared for flight, an FAA inspector detected alcohol on the pilot's breath and, after notifying local officials of the airline, removed the plaintiff from the flight and took him to a medical clinic to draw a blood sample. The medical clinic subsequently submitted the sample to a laboratory, however, the technician who prepared the sample, prior to shipping it to the laboratory, did not comply with local chain of custody instructions regarding its submission. Ultimately, the test did show an elevated blood alcohol level, and the FAA issued an Emergency Order of Revocation of the plaintiff's Airman Certificate. The revocation was based on a violation of a regulation which prohibited a crew member from performing his duties with a blood alcohol level in excess of .04 percent.[332]

The plaintiff appealed the order and, at a subsequent hearing, the administrative law judge concluded that the handling and packaging of the blood sample did not qualify as a proper chain of custody and refused to consider the analysis as evidence. He concluded that there was no other evidence to prove the blood alcohol level and reversed the emergency order. The FAA appealed to the full National Transportation Safety Board (NTSB), which reversed and remanded on the basis that the administrative law judge should have considered the totality of the evidence to determine whether the blood analysis would be sufficient enough to consider. With these instructions, the administrative law judge reconsidered, but concluded that the chain of custody had been broken and once again

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[331] 953 F.2d 1214 (10th Cir. 1992).
[332] 14 C.F.R. § 91.17(a)(4) (1992).

reversed the emergency order. On a second appeal, the NTSB concluded that the reliability of the analysis was sufficient to be considered and, since the plaintiff had not contested its reliability, the emergency order should be affirmed. The plaintiff appealed to the United States Court of Appeals for the Tenth Circuit, which affirmed the revocation as being based on substantial evidence.[333] The court also dismissed the plaintiff's contentions that the NTSB's failure to dispose of the appeal within the prescribed time limit divested the NTSB of jurisdiction to complete its appeals process.[334]

The FAA in *McCarthney v. Busey*[335] revoked the Airman's Certificates of seven pilots based on intentional falsification of official records. The pilots subsequently challenged the action on the basis that the NTSB had not disposed of the appeal within 60 days. The court of appeals for the Sixth Circuit concluded that the plaintiff failed to establish the timeliness defense because the pilots were required to show both that the rules required action within a specific period and that the rules specified the consequences of the failure of the NTSB to so comply.[336]

VIII. AIRPORTS

A. REGULATIONS

Alaska Airlines, Inc. v. City of Long Beach[337] involved protracted litigation regarding Long Beach's attempts to regulate air traffic at its municipal airport. The Ninth Circuit Court of Appeals struck down the city ordinance solely on the grounds that it did not provide adequate notice to ensure protection of important interests held by the airlines.[338] Of note is the inapplicability of attacks on the

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[333] *Gallagher*, 953 F.2d at 1215.
[334] *Id.*
[335] 954 F.2d 1147 (6th Cir. 1992).
[336] *Id.* at 1152.
[337] 951 F.2d 977 (9th Cir. 1991).
[338] *Id.* at 981.

ordinance on grounds of federal preemption,[339] impermissible burden on interstate commerce,[340] violation of equal protection,[341] and capricious interference with legitimate governmental concerns were held *inapplicable*. Accordingly, the decision seems to provide support for the legal position that a municipality might significantly curtail air traffic at its airport if proper notice of reductions or changes is made with an appropriate opportunity for an advance hearing.

International Society for Krishna Consciousness, Inc. v. Lee[342] involved the constitutional issue of whether an airport facility's regulation prohibiting solicitation in certain areas of the terminal violated the plaintiffs' First Amendment rights and were subject to declaratory and injunctive relief.[343] The regulations promulgated by the Port Authority of New York and New Jersey forbid repetitive solicitation of money or distribution of literature within the terminal. Areas outside the terminal were not included in this prohibition. Chief Justice Rehnquist, on behalf of the Court, concluded that an airport terminal could not be considered to be a public forum and thus, the traditional right to gather on public streets did not control the activity within an airport terminal.[344] The Court also noted that the terminal did not fit into the characteristics of a public forum as its principal purpose was not the free exchange of ideas. Rather, the clear purpose of an airport terminal was to contribute to efficient air travel and it was rare that the design intent included a purpose for solicitation and distribution activities.[345] Through this evaluation the Court concluded that the Port Authority need not show a compelling state interest

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[339] U.S. CONST. art. VI, cl. 2.

[340] U.S. CONST. art. I, § 8, cl. 3.

[341] U.S. CONST. amend. XIV, § 1.

[342] 112 S. Ct. 2701 (1992).

[343] 42 U.S.C. § 1983 (1988).

[344] *Lee*, 112 S. Ct. at 2706 (citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985)).

[345] *Id.* at 2706-07.

in the regulation, but need only satisfy a reasonableness standard. Accordingly, regulation could be enforced.[346]

In *Jacksonville Port Authority v. Alamo Rent-A-Car, Inc.*[347] the car rental company unsuccessfully challenged an airport access privilege fee imposed on off-airport car rental companies. The court concluded that the fee was not a tax, but rather a user fee which was appropriately charged for the use of the roads built and maintained by the Airport Authority pursuant to its charter and consistent with the public interest.[348]

City of New Orleans v. City of Kenner[349] involved the New Orleans Aviation Board plan to construct certain improvements to its airport for which it obtained approval from the FAA as well as federal funding for certain aspects of the project. Hearing of the proposed construction, the neighboring City of Kenner, in which part of the airport was situated, believed that the proposed construction may have an adverse impact on it. Its city counsel adopted a resolution that precluded any expansion of the airport without the express approval of Kenner. New Orleans filed a declaratory judgment action in federal court asking that Kenner be enjoined from preventing the expansion as agreed to between New Orleans and the FAA. In a detailed opinion, the court concluded that merely entering into a contract with the FAA did not allow New Orleans to ignore or circumvent the local government entity that had jurisdiction over the ground on which the expansion would be made.[350] The court held there was no subject matter jurisdiction which allowed this case to be brought in federal court and dismissed the case.[351] The

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[346] *Id.* at 2708.

[347] 600 So. 2d 1159 (Fla. Dist. Ct. App. 1992).

[348] *Id.* at 1165; *see also* Enterprise Management, Inc. v. Huntsville-Madison County Airport Auth., 601 So.2d 897 (Ala. 1992).

[349] Civ. A. No. 91-4107, 1992 WL 21744 (E.D. La., Jan. 28, 1992), *vacated*, 971 F.2d 748 (5th Cir. 1992).

[350] *Id.* at *4.

[351] *Id.* at *6.

decision was subsequently vacated by the court of appeals for the Fifth Circuit on August 6, 1992.

B. DUTIES

In *Duncan v. Metropolitan Topeka Airport Authority*[352] the plaintiff's decedent, a member of the Oklahoma Air National Guard, was involved in an exercise in which required him to rapel approximately seventy-five feet from a helicopter. The exercise was conducted at Forbes Field which was vacant property owned by the Metropolitan Topeka Airport Authority. One of the members of the assault team accidentally cut the rope being utilized by the decedent and the injuries he sustained when he contacted the ground brought about his death. The sole cause of action against the Metropolitan Topeka Airport Authority related to its duty to provide emergency medical personnel during the course of the drill. The court granted a motion for summary judgment on the basis that no duty existed, either explicit or implicit, in allowing the exercise to take place on the vacant property and thus, as a matter of law, no basis existed on which to establish liability against the defendant airport authority.[353]

Queen City Aviation, Inc. v. City of Allentown[354] involved a claim by a Fixed Based Operator (FBO) which had lost a contract to provide certain services for the municipal airport. A complaint was filed in federal court alleging that Allentown violated the FBO's civil rights. The undisputed facts indicated that the plaintiff was the exclusive FBO at the airport from 1981 through 1991 and, thereafter, the City issued a Request for Proposals to lease the airport to a full service FBO. Two bids were received and the plaintiff's was not selected. A lawsuit followed and the district court granted a motion to dismiss concluding that the plaintiff was no more than a jilted customer who

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[352] No. 91-1146-K, 1992 WL 42914 (D. Kan. Feb. 10, 1992).

[353] *Id.* at *2.

[354] Civ. A. No. 91-7776, 1992 WL 131148 (E.D. Pa. Aug. 3, 1992), *aff'd*, 993 F.2d 225 (3d Cir. 1993).

accused the city and its new partner of duplicity. Accordingly, the complaint was dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).[355]

IX. COMMERCIAL

A. BANKRUPTCY

In re Pan American Corp.[356] related to a bankruptcy Chapter 11 proceeding in which the debtors petitioned to remove to federal court certain Florida state court actions. The underlying facts related to the Lockerbie, Scotland, crash of Pan American Flight 103 on December 21, 1988. In this complicated procedural battle involving fifty-five plaintiffs, the defendants attempted to utilize the air carrier's Chapter 11 status to transfer the state court actions to federal court in New York. Each of the plaintiffs had filed state and federal court actions in Florida, and the defendants intended to have the actions in Florida transferred to the Southern District of New York where Pam Am's petitions for reorganization were pending. Further, pursuant to multi-district litigation court procedures, the cases subsequently would be transferred to the United States District Court for the Eastern District of New York. The presumed underlying motive of the defendants was that Chief Judge Platt of that court previously had entered some favorable rulings regarding punitive damages in relation to the Warsaw Convention.[357]

The Pan Am defendants moved in the Southern District of New York, where the bankruptcy case was pending, for an order transferring the Florida state court actions to the Southern District of New York.[358] The district court, in reviewing the requested transfer, concluded that it should abstain from the requested transfer in accordance with

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[355] *Id.* at *2-4.

[356] 950 F.2d 839 (2d Cir. 1991).

[357] *Id.* at 843 n.5 (citing *In re* Air Disaster at Lockerbie, Scotland, on December 21, 1988, 928 F.2d 1267 (2d Cir.), *cert. denied*, 112 S. Ct. 331 (1991)).

[358] *See* 28 U.S.C. § 157(b)(5) (1988).

federal law.[359] The thrust of its decision was that the transfer merely would lead to more delay and expense in resolving the litigation and thus, it believed it was preferable for the parties to have the cases remain in Florida where they could be litigated in the Florida courts.[360]

The Second Circuit Court of Appeals reviewed the lower court's denial to transfer, utilizing an abuse of discretion standard. In reviewing the bankruptcy law and the doctrine of pre-emption, the court concluded that there should be an initial presumption to transfer the action to the forum of the insolvency in order to better preserve the assets of the debtor.[361] Since the Lockerbie crash involved federal rather than state law, the transfer to the federal court in New York should be carefully considered. The court remanded the case to the lower court to review the facts with a presumption against abstention.[362]

The plaintiff in *TPI International Airways, Inc. v. FAA*[363] was in Chapter 11 and filed this adversary proceeding seeking money damages against the FAA based on improper activities relating to the revocation of the plaintiff's certification and authority from the Department of Transportation to engage in flight operations. The complaint claimed that the fines imposed by the FAA on plaintiff in the amount of $810,000 were unsupported by evidence and should be stricken. Secondly, because of the activities of the FAA and the Department of Transportation in refusing to allow the plaintiff to conduct flight operations, the plaintiff had sustained further monetary damages.

The court concluded that the claims sounded in tort and analyzed whether the activities of the FAA constituted

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[359] *Queen City Aviation, Inc.* 950 F.2d at 843 (citing 28 U.S.C. § 1334(c)(1) (1988)).

[360] *Id.*

[361] *Id.* at 845.

[362] *Id.* at 848. One of the cases (*Rosenkranz*) involved a crew member and thus, was not subject to the Warsaw Convention. The appellate court, therefore, affirmed the lower court's decision regarding that claim in refusing to transfer it. *Id.*

[363] 141 B.R. 512 (Bankr. S.D. Ga. 1992).

a discretionary function pursuant to the Federal Tort Claims Act (FTCA).[364] After a thorough review of pertinent case law, the court concluded that *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*[365] was controlling, and the activities of the FAA relating to the plaintiff were clearly protected as a discretionary activity. The court did conclude, however, that the FAA had not provided sufficient information to fully document and support its claims for penalties and denied the government's petition to dismiss this count.[366]

B. PROPERTY RIGHTS

In *G.S. Rasmussen & Associates, Inc. v. Kalitta Flying Service, Inc.*,[367] the plaintiff developed a modification to the DC-8 aircraft design that enabled it to fly with substantially heavier loads. He also obtained a Supplemental Type Certificate (STC) from the FAA regarding this modification.[368] Discussions thereafter were held between plaintiff and the defendant to transfer the STC to Kalitta for $95,000. Prior to this purchase, however, the defendant decided to copy the Supplemental Flight Manual from Rasmussen, obtain the appropriate equipment and install it on a DC-8 aircraft. After doing so, the defendant applied for and received an airworthiness certificate from the FAA.

The plaintiff sued for conversion and unjust enrichment. The district court granted summary judgment for the defendant on the basis that the plaintiff had no protectable property right under state law and his action was preempted by copyright and patent laws. The appellate court concluded that copyright and patent laws were not applicable, but reversed, concluding that without the efforts of the plaintiff, the STC would not have come into

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[364] *Id.* at 519 (citing 28 U.S.C. § 2680(a) (1988)).
[365] 467 U.S. 797 (1984).
[366] *Id.* at 521.
[367] 958 F.2d 896 (9th Cir. 1992), *cert. denied*, 124 L. Ed. 2d 678 (1993).
[368] *See* 14 C.F.R. § 21.113 (1992).

existence.[369] Thus, plaintiff had a legal claim under California law to the exclusive use of the STC.[370]

In *American Airlines v. Christensen*[371] the airline sued a group of travel discount brokers for inducing frequent flyers to sell their awards to the brokers. The court ruled in favor for the plaintiff concluding that did not violate the federal antitrust laws[372] and, since there was a "no-sale" rule within the applicable program, the program was subject to enforcement by the issuing airline.[373]

C. SALES

Meagher v. Compania Mexicana de Aviacion[374] concerned a contract claim regarding the sale of an aircraft by a non-air carrier to Mexicana Airlines. The aircraft in question previously had been leased to Delta Airlines for approximately twelve years and, pursuant to a lease termination agreement, Delta returned the aircraft after performing a regularly scheduled and legally required inspection for structural and mechanical defects ("C" check). Mexicana entered into a lease with the owner of the aircraft that expressly disclaimed warranties and representations as to air worthiness of the aircraft. The only condition mentioned required the prior lessee, Delta, to perform the "C" check. Prior to accepting the aircraft, Mexicana had the opportunity to perform its own inspection and to refuse acceptance of the aircraft if it determined that the aircraft was not in the anticipated condition.

The court concluded that the language of the lease agreement was clear and unambiguous and, as a matter of law, the interpretation rested with the court.[375] Since Mexicana had the opportunity to inspect the aircraft prior to receipt and failed to detect any conditions that might

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[369] *Rasmussen*, 153 F.2d at 903.
[370] *Id.* at 906-07.
[371] 967 F.2d 410 (10th Cir. 1992).
[372] *Id.* at 413-14 (citing Sherman Act, 15 U.S.C. §§ 1-7 (1988)).
[373] *Id.* at 414.
[374] No. 90 Civ. 7464, 1992 WL 116429 (S.D.N.Y. May 20, 1992).
[375] *Id.* at *2.

otherwise have been discovered, amendment of the lease agreement to make the air worthiness of the aircraft a condition precedent to enforcement of the contract was not permitted.[376] The fact that Mexicana had operated the aircraft for approximately 18 months before contesting this issue was also considered by the court.[377] Additional findings, including the dismissal of Mexicana's tort claims, were made on the basis that Mexicana was unable to show privity with Delta and was alleged negligent misrepresentation was not appropriate under applicable New York law.[378]

Alaskan Oil, Inc. v. Central Flying Service, Inc.[379] involved the sale of a used Beech Aircraft that subsequently was determined to be so corroded as to be economically unfeasible to repair. The purchaser filed suit against the broker and the previous owner of the aircraft on theories of breach of warranty, fraud and strict liability. The matter was submitted to a jury, which found for the defendants on the first two theories and awarded damages under the strict liability claim. Appeal was taken and the verdict was affirmed. The court analyzed the law regarding economic losses and strict liability claims and concluded that Arkansas had endorsed the minority view which allowed such damages.[380] The court further concluded that the plaintiff had submitted sufficient evidence to support the jury's conclusion that the plane was in a defective condition and was unreasonably dangerous when it was purchased.[381]

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[376] *Id.* at *3.

[377] *Id.* at *1.

[378] *Id.* at *5 (citing Credit Alliance Corp. v. Arthur Andersen & Co., 483 N.E.2d 110 (N.Y. 1985)).

[379] 975 F.2d 553 (8th Cir. 1992).

[380] *Id.* at 555.

[381] *Id.*

X. MISCELLANEOUS

A. NEGLIGENCE

In *Albee v. Compania Mexicana de Aviacion*[382] the plaintiff instituted suit for injuries that she sustained while performing her duties as an employee of a ground services contractor responsible for cleaning aircraft. Plaintiff allegedly was shocked while attempting to connect a vacuum cleaner owned by her employer to the aircraft electrical system. Plaintiff contended that she was entitled to recover under a negligence theory as well as the doctrine of *res ipsa loquitur*. The court, applying Pennsylvania tort law, denied recovery, concluding that she had failed to demonstrate whether the cause of the accident was something wrong with the electrical system of the aircraft or whether there was a defect in the vacuum cleaner and/or its cord and plug.[383] Since she could not rule out negligence on the part of her employer, her cause of action against the airline was deficient as a matter of law.[384]

In re Air Crash Disaster Near Cerritos, California, August 31, 1986[385] involved whether the negligent infliction of emotional distress was a cause of action recoverable by individuals who were on the ground and witnessed the mid-air collision and subsequent crash. The plaintiffs, Mr. and Mrs. Di Costa, contended that under California law, although they did not sustain any physical injuries and did not witness physical injuries to closely related victims, they should be entitled to present a claim for negligent infliction based on distress caused by fear for their own safety rather than injury to another. The event that the plaintiffs "witnessed" was not the collision itself or the wreckage from the crash, but rather two loud noises that apparently were caused by the collision.

The appellate court reversed the district court's dismis-

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[382] No. Civ. A. 90-6386, 1992 WL 122859 (E.D. Pa. May 28, 1992).
[383] *Id.* at *4.
[384] *Id.* at *5.
[385] 973 F.2d 1490 (9th Cir. 1992) [hereinafter *Air Crash Disaster*].

sal of their claim,[386] distinguishing the instant cause of action from the "bystander" victim theory enunciated in *Thing v. La Chusa*.[387] Citing *Christensen v. Superior Court*[388] the court held that the plaintiffs should have the opportunity to present evidence demonstrating that by hearing the two loud noises, they reasonably feared for their own safety and suffered emotional distress.[389] A lengthy dissent focused on the conclusion that merely hearing a loud noise should not be sufficient to constitute a cause of action in tort.[390]

Estrada v. Aeronaves De Mexico, S.A.[391] involved yet another claim by a person on the ground at the time of the mid-air collision above Cerritos, California. The court concluded that Ms. Estrada was entitled to pursue a cause of action against the airline and the United States for negligent infliction of emotional stress.[392] The facts indicated that she did *not* witness the plane crash into her home, but she returned minutes later to see that the home was consumed in flames. Further, when she had left the home minutes earlier she was aware that her husband and two children were in the house. She returned to see the burning home, thus she was aware that they were being injured.

Hasenfus v. Secord[393] involved the celebrated "shoot down" of a civilian aircraft involved in resupplying Nicaraguan rebels. Richard Secord, a retired Air Force general, was sued on the basis that he and his company were responsible for the "shoot down" in that they did not fully equip the aircraft with an inertial navigation system so the aircraft could fly at night. The trial court entered a directed verdict on the basis that the pilot was fully aware of

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[386] *Id.* at 1474.
[387] 771 P.2d 814 (Cal. 1989).
[388] 820 P.2d 181 (Cal. 1991).
[389] *Air Crash Disaster*, 973 F.2d at 1493-94.
[390] *Id.* at 1494-98.
[391] 967 F.2d 1421 (9th Cir. 1992).
[392] *Id.* at 1425.
[393] 962 F.2d 1556 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 972 (1993).

the equipment on the aircraft and, even if the organizers of the mission made certain misrepresentations that induced the pilot to continue flying, this was not the proximate cause of the "shoot down".[394] Accordingly, the court affirmed the directed verdict.[395]

B. DAMAGES

Johnson v. Continental Airlines Corp.[396] involved the crash of Continental Airlines Flight 1713 on November 15, 1987, which resulted in the death of twenty-eight persons with fifty-four other injuries. One of those injured was the plaintiff. After analyzing choice of law issues, the parties agreed that the law of Colorado would apply to liability, and the law of Idaho would apply to damages. The issue confronted by the appellate court was whether prejudgment interest should be awarded under the law of Colorado or Idaho. The intentions of the plaintiffs were readily apparent as the law of Idaho did not allow prejudgment interest, while that of Colorado did.

The appellate court concluded that prejudgment interest is an element designed to make the plaintiff whole and should be applied as a component of damages rather than one of liability.[397] In reviewing the Restatement of Conflict of Laws[398] for guidance, the court concluded that while under certain circumstances, distinct issues might be resolved under the laws of different jurisdictions, it would reject a smorgasbord approach as advocated by the plaintiffs.[399] The court reversed and remanded the matter to the district court with instructions that the law of each plaintiff's domicile governed the availability of prejudgment interest.[400]

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[394] *Id.* at 1562.
[395] *Id.* at 1563.
[396] 964 F.2d 1059 (10th Cir. 1992).
[397] *Id.* at 1062 (citing Monessen S.W. Ry. Co. v. Morgan, 486 U.S. 330 (1988)).
[398] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 17 cmt. c (1971).
[399] *Johnson*, 964 F.2d at 1063 (citing Vasina v. Grumman Corp., 644 F.2d 112 (2d Cir. 1981)).
[400] *Id.* at 1064.

In re Air Crash at Detroit Metropolitan Airport, Detroit, Michigan, on August 16, 1987[401] involved cross-motions for summary judgment in which the court provided a detailed analysis of the legal theories of collateral estoppel, contribution, indemnity and equitable subrogation. The instant motions were based on the jury verdict and ensuing judgments resolving certain issues between Northwest Airlines (Northwest) and McDonnell Douglas (MDC). By way of background, a joint liability jury trial involving personal injury plaintiffs began, but, before the court reached a verdict, Northwest and MDC settled with the plaintiffs and the trial proceeding ultimately ended in a verdict approximately nineteen (19) months after jury selection had commenced. The jury concluded that the actions on the part of Northwest were 100 percent of the cause of the accident. The court entered an order in favor of MDC and against Northwest on its claims against MDC.[402]

In analyzing the motions for summary judgment, the court concluded that Northwest had been given and had taken ample opportunity to litigate and try issues of products liability in the joint liability trial.[403] Accordingly, Northwest would be collaterally estopped from relitigating these factual and legal issues in a claim for the hull loss.[404] Similarly, Northwest's third-party claims against the manufacturer of a circuit breaker would be precluded as this component constituted a part of the aircraft that the jury did not find to have been defective.[405]

Northwest also had made a claim against a car rental facility that had erected a light pole that was struck by the Northwest aircraft immediately prior to its impact with the ground. Applying Michigan law, the court concluded that the jury's finding that Northwest had engaged in willful and wanton misconduct was such to preclude Northwest

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[401] 791 F. Supp. 1204 (E.D. Mich. 1992).
[402] *Id.* at 1242-43.
[403] *Id.* at 1214-16.
[404] *Id.* at 1216.
[405] *Id.* at 1217-18.

from receiving contribution or indemnity from the car rental facility.[406] The pending claim for hull damage against the car rental facility, however, would remain viable, and the court granted Northwest the right to amend its hull claim to add a nuisance theory of liability.[407]

The court also held that MDC was *not* entitled to contribution for monies it paid to settle the personal injury claims since the jury had concluded it was *not* a tortfeasor.[408] Furthermore, the court concluded MDC was not entitled to common law indemnity because of the fact that it paid money to the plaintiffs based on *allegations* of fault.[409] Accordingly, it could not be concluded to have been totally without blame.[410] A final attempt at equitable subrogation was successful for MDC, however, on the same reasoning that failed in its argument on common law indemnity.[411]

Malsom v. Lowe[412] involved the crash of an aircraft during a "Family Fly-In" in Idaho with the death of the plaintiffs' decedent, who was a resident of Washington. Suit was filed by the decedent's parents against the flight instructor, a resident of Colorado, in federal court in Washington. The court subsequently transferred the matter to the District of Idaho by the court. The plaintiffs contended that Washington's wrongful death statute should apply. In analyzing the choice of law issue in accordance with Idaho law, the court concluded that Idaho had the most significant relationship to the parties, conduct and issues, and thus, the court would apply Idaho law[413] rather than the law of Washington or Colorado.

Kirchgessner v. United States[414] was a wrongful death ac-

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[406] 791 F. Supp. at 1231.
[407] *Id.*
[408] *Id.* at 1235-36.
[409] *Id.* at 1236.
[410] *Id.*
[411] *Id.* at 1237-38.
[412] 24 Av. L. Rep. (CCH) ¶ 17,161 (D. Idaho 1992).
[413] *Id.* ¶ (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1969)).
[414] 958 F.2d 158 (6th Cir. 1992).

tion brought under the Federal Tort Claims Act and applying, in part, the law of Michigan. The issue arose as to whether any deduction should be made from the damage award based on the fact that the decedent would have paid a certain portion of any income as taxes to the United States. Since Michigan law allowed recovery for the loss of financial support the claimant would have received from the decedent, the appropriate deduction for income taxes was in accordance with the state law and should be allowed.

C. ATTORNEY CONDUCT

In re Magdy F. Anis[415] the court reviewed certain "marketing" efforts of two New Jersey lawyers. Mr. Anis, a lawyer, sent a letter to the father of a passenger who was killed on Pan Am Flight 103 over Lockerbie, Scotland. The court ultimately reprimanded the attorney for the nature of his solicitation, relying both on the fact that it was offensive and concentrating on the fact that it was misleading in that the attorney set forth certain qualifications which he did not possess and made comments regarding other attorneys that could not be proven. While the appropriate ethical rules relate only to New Jersey, the cases cited herein provide a general review of articles and cases relevant to improper communication with families following an air disaster.

Certain orders in *In re Air Disaster at Lockerbie, Scotland, on December 21, 1988*[416] involved counsel for the plaintiffs and the United States filing motions for sanctions against defendant Pan Am and its attorneys for allegedly improper litigation activity. Essentially, each motion contended that the discovery undertaken by Pan Am, the filing of the third-party complaint against the United States and certain conduct in regard to the media was sufficient to authorize sanctions against the defendant and its

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[415] 599 A.2d 1265 (N.J. 1992), *cert. denied*, 112 S. Ct. 2303 (1992).
[416] 144 F.R.D. 618 (E.D.N.Y. 1992); 144 F.R.D. 613 (E.D.N.Y. 1992).

counsel. The court presented a detailed analysis in which it concluded that both motions were premature pending appellate review of the motion for summary judgment granted in favor of the United States, and the jury verdict. Further, the court, citing *Coltrade International, Inc. v. United States*[417] held that the motions needed to establish with specificity each instance of sanctionable conduct. The court therefore denied both motions as premature and granted the parties the opportunity to renew them following appellate review.

[417] 973 F.2d 128 (1992).